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In the Supreme Court
OF THE
United States

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OCTOBER TERM 1950

No. 300

VINCENT W. HALLINAN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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VINCENT W. HALLINAN,
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vs.
UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Vincent Hallinan, respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment imposing six months' imprisonment for asserted criminal contempt of Court.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1254(1) and Rule 38 of the Rules of the Supreme Court.

2. The decision of the Court of Appeals was rendered May 23, 1950. A petition for a rehearing was filed and served on June 22, 1950 and was denied on July 13, 1950, and on August 3, 1950 an order was made extending the time to file a petition for a writ of certiorari to and including September 11, 1950.

3. The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are in part as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court or of another Circuit Court of Appeals on the same matter, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.,* 313 U. S. 252, 85 L. Ed. 1313, 61 S. Ct. 866; *Helvering v. Price,* 309 U. S. 409, 60 S. Ct. 673, 84 L. Ed. 836; *National Licorice Co. v. National Labor Relations Board,* 308 U. S. 535, 60 S. Ct. 108, 84 L. Ed. 451; *Lane v. Wilson,* 305 U. S. 591, 59 S. Ct. 249, 83 L. Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (*Postal S.S. Corpo-*

ration v. El Isleo, 308 U. S. 378, 60 S. Ct. 332, 84 L. Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo,* 297 U. S. 530, 56 S. Ct. 580, 80 L. Ed. 844; *Le Tulle v. Scofield,* 308 U. S. 531, 60 S. Ct. 75, 84 L. Ed. 447; *McNabb v. United States,* 318 U. S. 332, 87 L. Ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam Co.,* 316 U. S. 149, 62 S. Ct. 966, 86 L. Ed. 1336; *Williams v. Jacksonville Terminal Company,* 314 U. S. 590, 62 S. Ct. 64, 86 L. Ed. 476; *National Labor Relations Board v. Express Publishing Company,* 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930; *Sprague v. Ticonic National Bank,* 306 U. S. 623, 59 S. Ct. 463, 83 L. Ed. 1028.)

(e) A writ of certiorari will issue where important constitutional questions are involved. (*Glasser v. United States,* 315 U. S. 60.)

SUMMARY STATEMENT OF FACTS AND ISSUES.

Appellant is an attorney-at-law. He was representing, as counsel, one Harry Bridges, a defendant in a criminal case being tried in the United States District Court of the Northern District of California,

Southern Division. The case was entitled United States of America v. Harry Renton Bridges, et al., No. 32117-H. In effect, the indictment charged the defendant Bridges with perjury (and conspiracy to defraud the government by committing perjury) in that on September 17, 1945, at a hearing in which he was granted naturalization to American citizenship, he allegedly swore falsely, and had conspired to do so in giving the following answer to the following question:

> "Do you now, or have you ever belonged to the Communist Party in the United States?
> A. I have not, I do not." (R.T. *481.)

The charge that this testimony was false involved *the identical issue* which had been litigated in earlier proceedings to deport Bridges, and terminating in the decision of this Court in *Bridges v. Wixon,* 326 U.S. 135 which was filed June 18, 1945.

The only factual difference in this respect between that case and U.S. v. Bridges No. 32117-H was the period which had elapsed between the date of the effective termination of the deportation proceedings and the date of the naturalization proceedings on September 17, 1945.

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*This case was submitted in the Court of Appeals on a typewritten record. The record was not printed for use in this Court in time to cite its paging in this petition. The typewritten record consists of five volumes. The first volume is the clerk's transcript of the District Court. The second, third and fourth volumes are the reporter's transcript from the District Court. The fifth volume is the clerk's transcript of the Court of Appeals, the pages of which have been numbered as a continuation of the reporter's transcript. In this petition the references to the record are to the paging of the typewritten transcripts.

One of the defenses in the deportation proceedings was that many persons had entered into a conspiracy to give false testimony that Bridges is or was a member of the Communist Party in order to get rid of him; that the motives for this conspiracy were to be found in the hatreds engendered by labor disputes in which he had taken part. This defense is noticed and summarized in the concurring opinion of Justice Murphy in *Bridges v. Wixon,* 326 U.S. 135, 157-160.

Before the trial, motions had been made to dismiss the indictment under Rule of Criminal Procedure 12 (b) on the ground, among others, that the deportation proceedings had made the matter *res judicata.* These motions had been denied. (C.T. pp. 34 to 49, also 86 Fed. Sup. 922.)

At the trial, the petitioner, as Bridges' attorney, tried to make two defenses: (1) that the deportation proceedings made the issue of Communist Party membership *res judicata* (as a rule of evidence) up to their effective termination date, and (2) a renewal of the defense urged at the deportation proceedings, that there was a conspiracy to give false testimony against Bridges, arising out of hatreds engendered by labor disputes. (The ruling of the District Court on the *res judicata* issue was by written opinion, *U. S. v. Bridges,* 87 F. S. 14, filed six days *after* the contempt judgment was issued.)

Petitioner tried to make these defenses at two stages of the case: *first,* in his opening statement, and *second,* in the cross-examination of the government's first witness, Garner. The opening statement for the

defense, with the Court's permission (R.T. 489), was made immediately after the opening statement for the prosecution, and before the taking of any evidence.

Petitioner's opening statement commenced on Thursday, November 17, 1949 and was completed on Friday, November 18. (R.T. 477, 489, 541, 585, 659.) *The Court did not cite petitioner for contempt up to that time.* The government's first witness, Garner, was examined by all parties during part of the morning and all of the afternoon Friday, November 18, and during all of the morning and part of the afternoon of Monday, November 21. Some time before the afternoon session of Monday, November 21 terminated Garner was dismissed and John H. Schumacher took the witness stand. (R.T. pp. 759, 772.) *The Court made no move to cite petitioner for contempt when the testimony of Garner was complete,* or thereafter on that day.

On the morning of Tuesday, November 22, the District Judge read a certificate and summarily found petitioner guilty of contempt of Court, purportedly under Rule of Criminal Procedure 42(a), and that afternoon sentenced him to six months in jail and to have his name stricken from the roll of attorneys entitled to practice in the United States District Court for the Northern District of California. (R.T. pp. 773 to 817 and 838 to 848.)

In its opinion affirming the judgment, the Court of Appeals selected from the District Court's certificate those items which seemed to the Court of Appeals to support most strongly the judgment of the District Court. In addition, the Court of Appeals reassembled,

in what it regarded a logical sequence and grouping, the items upon which it based its affirmance of the judgment.

The opinion of the Court of Appeals is set forth in the record as a continuation of the paging of the Reporter's Transcript at pages 975 to 986 of that transcript. It is also set forth in the appendix to this petition, pages 97 to 108. As set forth in the appendix there are added, for purposes of easy reference and comparison, division marks and marginal notes separating and identifying various items, and underlinings to direct attention to particular statements.

The Court of Appeals deals separately with the charges of contempt with relation to the opening statement and the charges of contempt with relation to the cross-examination of Garner. It divides the asserted contumacious acts of petitioner during the opening statement into four categories, the first of which is the matter of union labor disputes. It discusses eight separate incidents under such category and under the first of such incidents it makes reference to three previous instances without identifying them by quotation or transcript page reference.

Concerning the first of such eight incidents the Court of Appeals says:

> "While the certificate makes no reference to *prior admonitions** the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activi-

*All emphasis added unless otherwise indicated.

> ties in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the Court." (Appendix pp. 98, 99.)

By so doing the Court of Appeals treats such *expression of opinions* as **orders.**

In our petition for a rehearing, we pointed out that none of the three previous instances mentioned by the Court of Appeals had amounted to an order (Appendix, pp. 9 to 16), that during the course of this incident itself the District Court said to petitioner, **"I am not going to limit you * * *"** (Appendix, pp. 16 to 19), and said to petitioner, "At the present time I suggest that you give an outline of what you have in mind". thereby inviting petitioner to give to the Court and to the jury an outline of his reasons for contending that the discussion of labor union disputes was relevant and material and proper in an opening statement. (Appendix, p. 19.) We also pointed out that petitioner in responding to such invitation, made an explicit statement of his position, that the soundness of such position was not challenged either by the Court or government counsel, and that the Court, **by its silence,** *impliedly gave permission to petitioner to proceed along the lines indicated by him.* (Appendix, pp. 20 and 21.)*

In the appendix we have printed in full a copy of the petition for a rehearing which we filed in the Court of Appeals. This has been done by a photo-lithographic process, which enabled us to superimpose in typewriting clearly distinguishable from the original printing corrections of typographical errors and omissions. That petition is printed in the appendix for a threefold purpose, namely: (1) to show to this Court that we called to the attention

By the statement, **"I am not going to limit you"**, the District Court revealed that it had not intended any previous statement to act as a limitation in this regard and that it did not intend the statement it was then making to act as such a limitation.

From the foregoing it affirmatively and positively appears that in the **first** incident selected by the Court of Appeals as a predicate for the affirmance of the judgment: (1st) that no previous order was violated by petitioner, as impliedly found by the Court of Appeals; (2nd) that in said incident no order restricting petitioner was given, as impliedly found by the Court of Appeals; (3rd) that only by quoting out of context and in foreshortened form and by the employment of ambiguous words and phrases and shifting terms (Cf. "orders", "admonitions", "expressed the opinion" etc.) and by ignoring the statement, **"I am not going to limit you"**, that the Court of Appeals was able, in its opinion, to make it appear either that in this incident petitioner had violated previous orders or that in this incident the Court made an order which was later violated by petitioner, and (4th) that the Court of Appeals, by accepting as true the accusation made by the District Court where the record affirmatively and positively revealed that it was false, in effect de-

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of the Court of Appeals the factual errors in its opinion which we are calling to the attention of this Court; (2) to enable us to shorten this petition without omitting references to and quotation from the record which we deem vital to our presentation of the case and (3) to shorten this petition by not repeating in full arguments which we made in that petition and which we think this Court should have before it for a full understanding of the case.

nied petitioner *a hearing in substance* upon this issue and gave him only that which is commonly called a "kangaroo" hearing, that is, a hearing in form only.

The second incident is recited by the Court of Appeals as follows:

> "Subsequently, appellant again began a recital of a history of the growth of the C.I.O., and its expulsion from the A.F.L., which was said to have been accompanied by charges that the C.I.O. and certain of its leaders, including Bridges, were communistic. This recital was objected to and the objection sustained."

In our petition for a rehearing, we pointed out that *"this recital"* **was not** "objected to" as stated by the Court of Appeals; that the objection, when it came, was directed to the statement that Bridges had been expelled from the A. F. of L. as communistic *because* he had encouraged the amalgamation of his union with the C.I.O. and, that the ruling was *"The* objection is sustained". (Appendix, pp. 22 to 24.)

The third incident is recited by the Court of Appeals as follows:

> "The Court, in its certificate, then refers to a 'long dissertation' by appellant concerning 'some internal warfare between the C.I.O. and the A.F. of L.' It appears of record that immediately after the sustaining of the above objection, appellant made some statement concerning the affiliation of Bridges' I.L.W.U. with the C.I.O. and began a further discussion of a Maritime Federation of the Pacific. Objection was again made and sustained."

In our petition for a rehearing we pointed out that the objection in this instance was not to the mention of labor union disputes as such but was that petitioner's statement was too broad and general and that the ruling, in effect, was that petitioner should be more specific. (Appendix, pp. 24 to 26.)

The fourth incident is recited by the Court of Appeals as follows:

> "Immediately thereafter, in disregard of the ruling, appellant continued with the discussion of the Maritime Federation of the Pacific, and its alleged control by Harry Lundeberg, who appellant stated would be a government witness, and to whom he referred in derogatory language. Objection was made and the Court said: 'What Mr. Hallinan has to say is in reality that type of matter that may be reserved for closing argument, if the facts demonstrate it. * * * *I think,* Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.'" (Appendix, p. 99.)

It is apparent from what we have heretofore said that when petitioner "continued with the discussion of the Maritime Federation of the Pacific and its alleged control by Harry Lundeberg" etc. he did not do so "in disregard of the ruling". We pointed out in our petition for a rehearing that petitioner in this incident began at once to *comply* with the Court's ruling to be more specific. (Appendix, pp. 24 to 30.)

The fifth incident is recited by the Court of Appeals as follows:

> "The certificate recites that only a few seconds or minutes later, appellant again 'launched into the same demeanor, same conduct, persistent, studied as it was.' From the record we learn that when appellant resumed his opening statement, his very first sentence had to do with quarrels between Bridges' union and the A.F.L. He went on to charge that Lundeberg and another labor leader were joined in their fight against Bridges and the latter's union by employer groups, goon squads, killers and perjurers. After the statement that certain government officials also joined in this persecution of Bridges, although other 'upstanding, granite-honest' government officials had gone out of their way to protect him, another objection was interposed and sustained." (Appendix, p. 99.)

In our petition for a rehearing we pointed out the phrase "same demeanor" stands without predicate in that at no other place in the record or the certificate is petitioner's demeanor mentioned or described, and that in this instance it is characterized as improper only by implication, innuendo and suggestion. (Appendix, p. 31.)

In our petition for a rehearing, we also pointed out that in this instance petitioner spoke without interruption for 3 transcript pages, that no objection was made to any mention of union labor disputes and that the objection when it came related to an **entirely different subject**, namely, that in the part government officials had gone out of their way to protect Bridges. (Appendix, pp. 31 and 32.)

The sixth incident related not to union labor difficulties as such but to the fact that Bridges' enemies had caused a warrant for his deportation to be issued and that the House of Representatives had passed a bill of attainder against him. (Appendix, pp. 99 and 100 and 33 and 34.)

The seventh incident consisted of petitioner's statement that "Bridges has (sic: had) made a mistake in not taking the $50,000 that was offered to him back in 1934 to throw the strike and go back to Australia".

The ground of the objection was not stated and the ruling was not directed against the mention of labor union disputes. (Appendix, pp. 100, 34 and 35.)

The eighth and last incident dealt with by the Court of Appeals under the category of labor union disputes is recited by that Court as follows:

> "* * * and appellant then referred to the labor situation in Hawaii as 'the renewal of about what had happened in San Francisco—poison gas and clubs for the workers * * *.' Again objection was made and again sustained."

We pointed out in our petition for a rehearing that while this statement did relate to a union labor dispute, it was not in defiance or disregard of any previous ruling in that the only previous ruling relating to the mention of union labor disputes was the ruling under the third incident which was directed against statements which were general rather than specific. (Appendix, pp. 35 and 36.)

The second category of asserted contumacious acts during the opening statement dealt with by the Court of Appeals relates to attacks on the character and credibility of opposing witnesses. The Court of Appeals commences its discussion of this subject with the following statement:

> "The next type of matter found in the opening statement consists of direct attacks upon the credibility and character of anticipated opposing witnesses. The Court, in the absence of the jury, stated that **in its opinion** appellant had, in his opening statement, been 'anticipating much of the Government's case, indulging in speculation on speculation,' and 'creating an atmospheric quantity at this stage designed to prejudice and inflame the jury.' *Reference is made* to Government counsel's statement *as to the* **position of the Government.** This, the record discloses, was to the effect that appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement." (Appendix page 100.)

Here we find two predicates stated for subsequent findings of contumacious conduct. One is an **opinion** expressed by the District Court—an opinion which quite obviously did not amount to an *order* forbidding petitioner from attacking the character and credibility of prospective prosecution witnesses in the opening statement—and a **position taken** by the prosecution "to the effect that" petitioner "was not entitled to attack the credibility of prosecution witnesses in the opening statement."

In our petition for a rehearing we pointed out that the certificate did not claim that the position so taken

by the prosecutor had been converted by the trial Court into a ruling that, on the contrary, the record disclosed that the trial Court, in a statement made immediately after the prosecutor had stated such position, said to petitioner: **"I, of course, am at a loss presently to indicate to you how we may delimit your presentation at this time."** (Appendix pages 38 and 39.)

We also in our petition for a rehearing called attention to "the fact that to predicate a charge of criminal contempt upon the fact that counsel for a defendant in a criminal case had failed to follow a **position** taken by the prosecutor **concerning how the case of the defendant should be presented,** while in conformity with the practice in totalitarian countries, runs counter to the fundamental principles of our American system of justice. (Appendix pages 37 to 42.) We also in our petition for a rehearing called attention to the fact that the Court of Appeals would not have made reference to the **position** so taken by the prosecutor had it not regarded that position as legally sound (i.e. **thereby establishing a precedent to that effect)** (Appendix page 39) that every prosecuting attorney in making an opening statement in a criminal case necessarily attacks the character and credibility of the defendant or defendants (Appendix page 39), that in this case the prosecutor in his opening statement attacked the character and credibility not only of the three defendants but of **every person they could possibly call to controvert directly the witnesses called by the prosecution** (Appendix p. 40) and that under the law of our land the defense

had as great a scope in the making of an opening statement as did the prosecution. (Appendix pp. 40 and 41.)

The first incident, under this heading discussed by the Court of Appeals (which in our petition for a rehearing we called the ninth incident) is the same incident considered by that Court as the fourth incident, i.e., petitioner's characterization of Lundeberg.

We pointed out in our petition for a rehearing that in this incident the District Court did not make a ruling foreclosing petitioner from making further attacks upon the credibility and character of anticipated opposing witnesses but by the phrases "to my mind", "I think" and "I am naturally indulgent toward counsel on both sides" did no more than express an opinion which did not amount to a ruling. (Appendix pp. 43 and 44.)

The next or tenth incident was discussed by the Court of Appeals as follows:

> "Only a few seconds later, appellant 'launched into the same demeanor, same conduct, persistent, studied as it was.'* The subsequent statements included assertions that the defense would prove that Lundeberg and another labor leader employed a known murderer to kill Bridges and did in fact send a man to New Orleans who killed a C.I.O. organizer there. Appellant also asserted that the labor leaders had under their control goon squads, killers and perjurers." (Appendix pp. 100 and 101.)

*This is a repetition by the Court of Appeals of the one statement of the kind made by the District Court.

Observe that the Court of Appeals mentions no objection and no ruling. In our petition for a rehearing we pointed out that the statement here asserted to be in defiance of previous rulings was not in defiance of any previous ruling in that no such previous ruling had been made and that such statement was not objected to and no ruling was made thereon to serve as a predicate for a claim that some subsequent statement of petitioner constituted contempt. (Appendix pp. 45 and 46.)

The next (eleventh) incident is stated by the Court of Appeals as follows:

> "Appellant further stated: 'Now, as early as 1936 there had been introduced into Harry Bridges' union and into his personal office as his private secretary a woman employed by the Waterfront Employers Association, and she was also the mistress of Mr. Harry Lundeberg.' Objection was made and appellant gave as justification for the statement his purpose of showing Bridges' consciousness of being watched by agents of his enemies, who would use against him any detected activities in the Communist Party. The Court then said, among other things, that an opening statement was not a sounding board for giving vent to immaterial matters, and that it was very unfair to make such a reference to the woman." (Appendix p. 101.)

In our petition for a rehearing we called attention to the fact that the District Court did not say "that it was very unfair to make such a reference to the woman" but said "I *think* it *rather* an extreme situation that *reference* be made to this woman at this

juncture *without evidence before the Court or jury,"* and that the District Court did not sustain the prosecutor's objection. (Appendix pp. 46 and 47.)

That which we, in our petition for a rehearing, called the twelfth incident, is no incident at all. It consists of *an expression of opinion* by the District Court, viz. "Now, I *think* it highly unfair *to this Court,* indulgent as I have been with you, to continue on that line or that particular vein. (Appendix p. 101.) "That line" referred to petitioner's reference, **more than 35 transcript pages before,** that there was a conspiracy against Bridges in which 125 persons **had** taken part. (Appendix pp. 48 and 49.)

The thirteenth incident related to petitioner's reference to three prospective prosecution witnesses, viz., Benjamin Kiplau (sic: Benjamin Gitlow) "who occupied most of his life as a labor spy;" Manning Johnson "who was raised by the Communist Party from a cafeteria busboy to some sort of organizer and is now qualified as a government witness" and Louis Budenz "who deserted a somewhat impecunious position on a Communist newspaper and returned or went into the Roman Catholic Church". (Appendix pp. 50 and 101.) No objection was made but petitioner was interrupted by the statement "Just a moment" and "There was nothing said in our opening statement as to who the witnesses would be." (Appendix pp. 50 and 51.) The District Court, in the presence of the jury (R.T. p. 571) said: "What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assinate in advance every witness who might take the stand without any evidence before this Court to the general charac-

terizations and vituperations." That obviously was not an order or ruling. It obviously was an attempt by the trial Court to discredit petitioner (and petitioner's client) in the eyes of the jury. Petitioner replied "All right, that is just what I say, Your Honor."

The trial Court then said: "That procedure may be extant or it may be the procedure in some other Courts. *It has never been the procedure in the federal courts.* I sustain the objection." (Appendix, p. 51.)*

The Court of Appeals cited the words above italicized and by so doing,, and by citing this incident as a predicate for upholding the judgment, adopted the ruling of the District Court. Such ruling runs counter to this Court's decision in *Alford v. U. S.*, 282 U.S. 687.

In our petition for a rehearing we called attention to the fact that Louis Budenz was a witness before the grand jury and that Manning Johnson later became a witness at the trial. (Appendix, p. 52.)

The next and last (fourteenth) incident discussed by the Court of Appeals under the category of attack on prospective witnesses is stated by the Court of Appeals as follows:

> "Later in the certificate reference is made to another objection. The record discloses the objectionable statements to have constituted a wholesale attack on 125 persons who appellant asserted would testify for the Government. Appellant ac-

*On page 46 of the petition for a rehearing—which is page 50 of the appendix—the citation to the reporter's transcript concerning this incident was erroneously given as pages 473 and 474. The correct citation is pages 573 and 574.

cused them of traveling 'any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers there, willing to say anything that would bring them a few dollars * * * for fame or what they call fame * * *. They are perjurers of the worst kind * * * spies, turncoats, the very swill of humanity * * *." (Appendix, pp. 101 and 102.)

In our petition for a rehearing, we called attention to the fact that there was no object and no ruling in or to this incident. (Appendix, p. 54.)

The Court of Appeals next discusses remarks of petitioner under the category of espionage and wire tapping by agents of the government. The entire statement by the Court of Appeals under this category is as follows:

"Another subject of rulings and statements was the asserted wire-tapping and 'espionage' activities of Government agents against Bridges. Appellant stated that in Seattle in 1937, 'agents of the Immigration Department dictographed his (Bridges') hotel room and tapped his telephone wire.' The Court interrupted and the prosecutor, upon inquiry from the Court, renewed his assurance that no illegally obtained evidence would be introduced. The Court then ruled as follows: 'The objection is sustained, the jury is admonished to disregard the statement, of any kind, character or description, bearing upon that matter.'

"Appellant made a subsequent reference to espionage activities of the F.B.I. against Bridges. Objection was again made and again sustained.

> Almost immediately after the sustaining of the objection appellant referred to 'the boyish workings of the F.B.I.' and stated that the defense would prove that scores of F.B.I. agents had for years been following Bridges, interviewing and threatening his friends and associates, trying to build up a case." (Appendix, p. 102.)

Observe that the ruling on the matter stated in the former of these two paragraphs related to wire-tapping and that nothing in the latter of these two paragraphs relates to wire-tapping. As a result such ruling did not foreclose petitioner from making the statements contained in the latter of these two paragraphs. This we pointed out in our petition for a rehearing. (Appendix, pp. 56 to 59.) We further pointed out in that petition that in the second paragraph, the objection *sustained* was to respondent's remark concerning what *the F.B.I. had done,* that the next statement related to articles which *Bridges had written* ridiculing the F.B.I. (a quite different matter), and that the third comment of petitioner,—**note this**—the third comment of petitioner which the Court of Appeals mentioned, and in *such a way as to imply that it was an act of contempt,* was made by petitioner *in direct response to the District Court's question to petitioner: "Is it your present theory that the F.B.I. were part and parcel of this conspiracy?"* (Appendix, pp. 59 and 60.)

In our petition for a rehearing we said:

> "In other words, in this last instance, *this Court is holding that appellant was guilty of criminal contempt* for answering a question asked by the

> **trial Court,** ***the answer, itself, being confined to the subject stated in the trial Court's question.*** **'Is this not' lifting by the bootstraps', i.e.,** ***a straining to find contumacious conduct*** **where none in fact exists."** (Appendix, p. 60.)

The fourth and last category of statements made by petitioner during the opening statement discussed by the Court of Appeals consist of two incidents *unrelated to each other or to any other incident.* One consisted of a remark by petitioner which was factually true and which was not heard by the trial Court (see Appendix, pp. 60 to 62) and which, for the latter reason, was not punishable summarily under Rule 42(a). The other consists of petitioner's statement to the Court: "Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Harry Bridges was a member of the Communist Party but had been elected to high office in it?" (Appendix, pp. 102 and 103.) When criticised for making such statement in the presence of the jury, petitioner stated "Your Honor, all the paper did was repeat what counsel said to the jury yesterday." (Appendix, p. 63.) Petitioner had reference to statements made during the opening statement of the prosecution appearing on page 487 of the reporter's transcript.

The Court of Appeals then discussed the matter of petitioner's good faith in making the opening statement and in so doing considered that for petitioner to have stated "that he expected to show Government witnesses to be liars, perjurers and low characters",

"who had conspired to give false testimony against Bridges"; and "that the motives for giving such false testimony were to be found in the hatreds engendered by labor disputes in which Bridges had taken part"; and "that some of the witnesses had appeared in proceedings to deport Bridges," and "that the matters referred to constituted a valid defense" would have been statements and conduct of petitioner of "mild and diluted form" and thus, inferentially, not indicative of bad faith. The Court of Appeals said, "It is true that counsel might properly inform the jury in a temperate manner that he intended *to impeach* the veracity and character of opposing witnesses *by the introduction of competent impeaching evidence*". This ignored completely the showing of lack of credibility and the lack of character through cross-examination falling short of impeachment, and the development, on cross-examination, of inconsistencies and improbabilities and bias. The Court of Appeals continued "Appellant did no such thing however. The most abusive language used and the vilest characterizations made were not in the form of a statement of what he intended to be proved" (by competent impeaching evidence?) "but a direct statement by appellant *of* his *opinion* of the witnesses. No other motive can be attributed to such statements and conduct than that appellant deliberately sought to *inflame* the minds of the jury and unduly prejudice them in advance of their appearance on the witness stand". And again, "Counsel's opinion of the character of witnesses who he thought might be called was not evidence. He could not validly say that he would prove the state-

ments made because *no witness would be* permitted to *hurl the epithets* which seemed to flow from the mouth of appellant with such ease and facility." And "Witnesses required to appear are entitled to protection from *unjustified character assassination and vilification and a Court is not in a position to determine the extent to which it may properly allow counsel to comment upon the character of a witness on the weight and credibility of his testimony until that witness has testified.*" (Appendix, pp. 103 and 104.)

In our petition for a rehearing we pointed out that petitioner had not, during the opening statement, hurled epithets, vile or otherwise, or used vituperative terms or inflammatory language. We did this by comments in paragraphs printed in italics at the end of our discussion of each incident, (Appendix, pp. 11, 12, 15, 21, 24, 26, 30, 32, 34, 35, 36, 44, 45, 46, 47, 49, 52, 54, 55, 60, 62, and 63) and by summing up such comments. (Appendix, pp. 65 to 67.)

In that petition we further pointed out that every charge made by petitioner against prospective witnesses was capable of being proven so *in full substance,* and cited the concurring opinion of Mr. Justice Murphy in *Bridges v. Wixon,* supra, in substantiation of that claim. (Appendix, pp. 66 and 67.)

We also pointed out in our petition for a rehearing that the matters which the Court of Appeals characterized as opinions of petitioner were matters within the *absolute knowledge* of the defendant Bridges and, as petitioner appeared as Bridges' counsel and spokesman and in no other capacity, they were, *by*

operation of law, by legal compulsion, matters *within the absolute knowledge of petitioner for all purposes of the trial.* (Appendix, pp. 68 to 70.) We further pointed out that the Court of Appeals, in characterizing such matters as being merely the opinions of petitioner held in practical effect *that Bridges was guilty of the charges against him or in other words that Bridges could not impart any knowledge of innocence to petitioner.* (Appendix, pp. 70 to 72.)

We also pointed out in said petition that insofar as such matters were the opinion of petitioner, they were predicated upon the following official documents all of which were of record in the Court of Appeals in the case of *Bridges v. Wixon,* 144 Fed. (2d) 527, and also in the District Court, viz.:

1. The Landis opinion in the first Bridges' deportation proceeding;

2. The Sears opinion in the second Bridges' deportation proceeding;

3. The board of reviews opinion (overruling Sears opinion).

4. Attorney General Biddle's opinion (overruling the board of reviews opinion).

5. The majority opinion of this Court in *Bridges v. Wixon,* supra.

6. Mr. Justice Murphy's opinion in *Bridges v. Wixon,* and

7. Even parts of the dissenting opinion in *Bridges v. Wixon.*

We further pointed out that opinions derived from a study of such documents were *more than personal opinions* and that the holding and expressing of them *could not be* evidence of bad faith, as impliedly held by the Court of Appeals. (Appendix, pp. 72 to 75.)

In the opening statement petitioner referred to the deportation proceedings which culminated in *Bridges v. Wixon,* 326 U.S. 135. Counsel for the prosecution "objected" to these statements and the Court "sustained" the objections.

In the opening statement counsel also referred to various phases of the conspiracy against Bridges' defense which is outlined in the concurring opinion of Justice Murphy. These references included statements to the effect that the defense would show the prosecution witnesses to be liars, perjurers and low characters; that in fact 125 witnesses *had been discredited* by the two fact finders in the two deportation proceedings. They also included references to various phases of the labor disputes in which Bridges had engaged and the statement that the defense would show that these disputes furnished the motive to give false evidence against Bridges.

Counsel for the prosecution likewise "objected" to these parts of the opening statement.

On Thursday afternoon, after retirement of the jury, there was a discussion between Court and counsel, in which the judge stated:

> "I take the position now that, one, these earlier proceedings are in nowise determinative of the issue at bar." (R.T., p. 513.)

And

> "So far as I presently know, I am not bound by the assertions, by the pronouncements nor by the opinion of any member or members of the Supreme Court. We are trying this case on an indictment concerning which we have had no review. Now, it may well be, to quote from the Justice, for whom I have the highest regard,—but at the same time, it is wholly irrelevant to this proceeding, as I see it." (R.T., p. 534.)

Petitioner, of course, took the position throughout that both the earlier proceedings and the defenses which had been raised and partly sustained did have a bearing on his client's case, which involved one of the same issues.

In setting forth instances of alleged contempt from the opening statement, the Court of Appeals' opinion *limits itself entirely* to petitioner's prospective *background and summary of the alleged conspiracy against Bridges*—matters outlined by Justice Murphy concurring in *Bridges v. Wixon,* 326 U.S. 135, 157. While the opinion charges that each successive item was mentioned in violation of a previous order, actually the petitioner was setting forth, *without repetition,* different items in a series. Moreover, as we have shown, the previous orders, to the extent that they were in fact orders and not mere expressions of opinion, were limited in their effect to the particular items to which they were addressed and were not general in scope. In a related situation (offers of proof) the Ninth Circuit itself has held that separate presenta-

tion of individual items is *necessary* to make a record on which to predicate, successfully, a claim of error. (*Lane v. U. S.*, 142 F. (2d) 249, 253.)

During the opening statement the District Court twice told petitioner that it was not going to place a general or sweeping limitation on him (i.e., **"I of course am at a loss presently to indicate to you how we may delimit your presentation at this time"** (R.T., p. 531), and **"I am not going to limit you * * * Mr. Hallinan * * *"** (R.T., p. 551) and twice in sustaining objections to specific items said that when it came to cross-examination, **"You may cross-examine without limitation on your part—you are not foreclosed from full, clear and sweeping cross-examination."** (R.T., pp. 527 to 532.)

This brings us to the subject of petitioner's cross-examination of the witness Garner.

In the cross-examination of Garner, the first government witness, petitioner tried to ask questions about the witness' knowledge and activities concerning the deportation case, and about the alleged conspiracy against Bridges, including illegal activities of the F.B.I. In spite of what it had said before, the trial Court sustained all objections to the first questions asked upon these two subjects. Petitioner asked SIX questions in all upon the subject of the deportation proceedings, and EIGHT questions on all the phases of the alleged conspiracy to give false testimony against Bridges. The Court sustained objections to all these, **except as to one question** concerning the witness' knowledge of wire-tapping. They are set

forth without segregation between the two subjects in the Court of Appeals' opinion. (See Appendix, pp. 105 and 106.)

Part of the background to this part of the case is the rule of the Ninth Circuit (and many other jurisdictions) that when an objection is sustained to the first question on cross-examination, *the cross-examiner must ask further questions on the same subject* or risk a defective record. (*F. & D. Co. v. Lindholme,* 66 F. (2d) 56, 60; *Gianotos v. U. S.,* 104 F. (2d) 929, 933.)

The Court of Appeals in an attempt to overcome the foregoing authorities (without citing them) said:

> "But, argues appellant, before the alleged error can be considered elsewhere, the record must be sufficiently explicit to enable the reviewing court to understand the nature and the purpose of the excluded evidence. With this statement we are in entire agreement," etc. (Appendix, pp. 106 and 107.)

In our petition for a rehearing we called attention to the fact, *not mentioned by the Court of Appeals,* that TWICE during his cross-examination of Garner, *petitioner implicitly invited the District Court to make an explicit ruling foreclosing him from asking questions of the character which he was asking, saying, in effect, that if such a ruling was not made he would have to continue to ask questions of that character to make a record,* and that THREE times during his cross-examination of Garner the prosecutor *explicitly asked the District Court to make such an explicit ruling,* AND that at the end of his cross-ex-

amination of Garner *petitioner explicitly invited the District Court to make such an explicit ruling* and that in EACH of these SIX instances the District Court *failed and neglected* and, in effect, *refused* to make such an explicit ruling. (Appendix, pp. 77 to 88. See, also, R.T., pp. 705, 733, 735, 739, 740, 742 and 754.)

In our petition for a rehearing we also called attention to the fact that in one instance the District Court, after first sustaining an objection to a question along the same lines, reversed itself and permitted the witness to answer (Appendix, p. 83), *thereby making it apparent to petitioner that none of the previous rulings of the District Court had been intended by that Court to foreclose petitioner from asking questions along such lines.* (Appendix, p. 83.)

As already stated, the District Court did not cite petitioner for contempt at the close of the cross-examination of Garner.

At the close of Garner's testimony petitioner asked permission (a) to ask the excluded questions on *Bridges v. Wixon* in the absence of the jury or alternatively (b) to make an offer of proof. Government counsel told the Court that either course was in contempt of its rulings excluding the testimony! The Court ordered the next witness called without passing on either request. (R.T., pp. 753-757.) After the jury had retired at 4 P.M. the Court first asked petitioner whether he wanted to make any offers of proof and then abruptly said that Court should reconvene at 9:30 the next morning "to discuss some of these legal mat-

ters". (R.T., p. 772.) The next day, without other warning, the sentence of contempt was imposed.

REASON FOR ISSUANCE OF WRIT.

A writ of certiorari should issue to review the judgment of the Court of Appeals affirming the contempt conviction for each of the following reasons:

1. The decision of the Court of Appeals and the judgment of the District Court severally contravene *the right of counsel* clause of the Sixth Amendment.

2. The Court of Appeals accorded petitioner a hearing in form only and not a hearing in substance, accepting the accusations of the certificate as true where the record conclusively shows that they are false, and thereby not only committed error which should be corrected by this Court pursuant to this Court's ruling in *U. S. v. McNabb,* 318 U.S. 332, but an error amounting to a contravention of the *due process of law* clause of the Fifth Amendment.

3. The Court of Appeals in effect overrules part of *Bridges v. Wixon,* 326 U.S. 135, when it holds that an attorney may be guilty of bad faith because of urging in the present case the defenses which were urged and considered by this Court in *Bridges v. Wixon,* involving an identical issue.

4. The Court of Appeals has made an important holding in federal criminal procedure, not previously passed on directly by this Court but contrary to the

principles of its decision in *Alford v. U. S.*, 282 U.S. 687, in holding that the defense cannot attack the credibility of prospective prosecution witnesses in its opening statement.

5. The Court of Appeals holds in conflict with the Fourth Circuit decision of *Sprinkle v. Davis,* 111 F. (2d) 925, 930, in holding that contempt of Court may be based upon the asking of six questions on cross-examination regarding the earlier case, after objection had been sustained to the initial question and the Court had stated it considered the earlier case immaterial. The Court of Appeals also ignored its earlier decision in *Meeks v. U. S.*, 163 F. (2d) 598, 601, in which the identical panel of judges cited and followed the holding in *Sprinkle v. Davis,* 111 F. (2d) 925, that such conduct by counsel *is not contempt* and that *adjudging counsel in contempt* (or *even* threatening to do so in the presence of the jury) *constitutes prejudicial error.*

6. The Court of Appeals has violated petitioner's rights under the First Amendment by punishing him for speaking in defense of his client on issues which could reasonably be thought to be relevant.

7. The Court of Appeals passes on a point not yet passed upon by this Court but probably contrary to the principles of its decisions and dicta (*Cooke v. U. S.*, 267 U.S. 517, 539; *In re Oliver,* 333 U.S. 257, 274; see, also, dissent of Holmes, J., in *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402, 422, cited with approval and, in effect, adopted in *Nye v U. S.*, 313 U.S. 33) in holding that summary contempt proce-

dure under Rule of Criminal Procedure 42(a) may be used where (a) the judge only certifies that the petitioner's conduct "if allowed to continue without comment on my part or official judicial action *might tend to interrupt* the orderly process of this trial" (R.T., p. 773) and (b) where contempt proceedings are postponed to a subsequent day. This latter question is also before this Court from the Second Circuit in *Sacher v. U. S.*, now pending on petition for certiorari, October Term 1950, No. 201.

8. The Court of Appeals holds contrary to *United Mineworkers v. U. S.*, 330 U.S. 258, 302, in holding that a sentence for criminal contempt is at the discretion of the trial Court rather than itself passing upon it.

9. The Court of Appeals held contrary to *Boyd v. U. S.*, 142 U.S. 450, 458, in making reference to other unrelated contempts of petitioner.

10. The District Court held contrary to *Ex parte Robinson*, 86 U.S. 505, in purporting to disbar petitioner on summary proceedings, and the Court of Appeals has left the matter in the air by failing to pass upon the effect of not incorporating such order in the written judgment.

PRAYER THAT WRIT ISSUE.

WHEREFORE, the petition prays that this Court issue its writ of certiorari to the Court of Appeals of the Ninth Circuit and that the cause be brought here for review and determination.

Dated, San Francisco, California,
September 8, 1950.

WILLIAM F. CLEARY,
GEORGE OLSHAUSEN,
ROBERT W. KENNY,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 8, 1950.

WILLIAM F. CLEARY,
Of Counsel for Petitioner.

(Supporting Brief and Appendix Follow.)

In the Supreme Court
OF THE
United States

October Term 1950

No.

Vincent W. Hallinan, *Petitioner,*

vs.

United States of America, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

1. THE DECISION OF THE COURT OF APPEALS AND THE JUDGMENT OF THE DISTRICT COURT SEVERALLY CONTRAVENE THE RIGHT OF COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

As far as we have been able to find, this is the first case in which the counsel rather than a client has claimed a right to protection under the right of counsel clause of the Sixth Amendment. In other words, no direct judicial authority has been found and the point must be presented on the basis of reason, historical precedent and oblique but analogous judicial authority.

Cooley in his work on Constitutional Limitations, Eighth Edition, in the chapter on Protection To Personal Liberty, says, on page 703:

> "Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client's guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law. The worst criminal is entitled to be judged by the laws; and if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether.[3]"

To such text there is added this footnote:

> [3]"There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court. The famous scene between Mr. Justice Buller and Mr. Erskine, on the trial of the Dean of St. Asaph for libel,—5 Campbell's Lives of the Chancellors, c. 158; Erskine's Speeches, by Jas. L. High, Vol. I, p. 242,—will readily occur to the reader as one of the exceptional cases. Lord Campbell says of Erskine's conduct: 'This noble stand for the independence of the bar would alone have entitled Erskine to the statute which the profession affectionately erected to his memory in Lincoln's Inn Hall. We

are to admire the decency and propriety of his demeanor during the struggle, no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. His example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England.' And elsewhere, in speaking of Mr. Fox's Libel Act, he makes the following somewhat extravagant remark: 'I have said, and I still think, that this great constitutional triumph is mainly to be ascribed to Lord Camden, who had been fighting in the cause for half a century, and uttered his last words in the House of Lords in its support; but had he not received the invaluable assistance of Erskine, as counsel for the Dean of St. Asaph, the STAR CHAMBER MIGHT HAVE BEEN RE-ESTABLISHED IN THIS COUNTRY.'*

"And Lord Brougham says of Erskine: 'He was an undaunted man; he was an undaunted advocate. To no court did he ever truckle, neither to the court of the King, neither to the court of the King's Judges. Their smiles and their frowns he disregarded alike in the fearless discharge of his duty. He upheld the liberty of the peers against the one; he defended the rights of the people against both combined to destroy them. If there be yet amongst us the power of freely discussing the acts of our rulers; if there be yet the privilege of meeting for the promotion of needful reforms; if he who desires wholesome changes in our Constitution be still recognized as a patriot, and not doomed to die the death of a traitor,—let us acknowledge with gratitude that to this great man, under Heaven, we owe this felicity of the

*Emphasis not ours.

times.' Sketches of Statesmen of the Time of George III. A similar instance of the independence of counsel is narrated of that eminent advocate, Mrs. Samuel Dexter, in the reminiscences of his life by 'Sigma', published at Boston, 1857, p. 61. See Story on Const. (4th ed.) pp. 1064, note."

In the trial of the Dean of St. Asaph the jury returned a verdict in these words "Guilty of publishing *only*" and Mr. Justice Buller was attempting to get the jury to delete therefrom the word "only", which would have had the effect of a finding of sedition in addition to that of publication. Mr. Erskine objected and insisted on the word "only" being recorded and in so doing kept interrupting the judge. Then this occurred:

"Mr. Justice Buller. Sir, I will not be interrupted.

Mr. Erskine. I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded.

Mr. Justice Buller. Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner.

Mr. Erskine. Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct."

The Speeches of The Hon. Thomas Erskine collected by James Ridgway, Vol. I, pages 228, 229—1810 Edition.

The "similar instance of the independence of counsel" "narrated of the eminent advocate, Mr. Samuel

Dexter, in the reminiscences of his life by 'Sigma,'" concerning which Cooley says "See Story on Constitution (4th Ed.) p. 1064 note" is quoted by Story as follows:

> "After Judge Davis had decided that the law was constitutional, and before that decision had been confirmed by a higher tribunal, Mr. Dexter persisted in arguing the question of constitutionality to the jury, notwithstanding the remonstrances of the bench. At length Judge Davis, under some excitement, *and after repeated admonitions,* said to Mr. Dexter, that if he again attempted to raise that question to the jury, he should feel it to be his duty to commit him for contempt of court. A solemn pause ensued; all eyes were turned towards Mr. Dexter. With great calmness of voice and manner, he requested a postponement of the cause until the following morning. The judge assented; some other matter was taken up, and Mr. Dexter left the court-room.
>
> "On the following morning there was a full attendance of persons anxious to witness the result of this extraordinary collision between the advocate and the judge. Being asked if he was ready to proceed with the cause on trial the preceding day, Mr. Dexter rose, and facing the bench, commenced his remarks by stating that he had slept poorly, and had passed a night of great anxiety. He had reflected very solemnly upon the occurrence of yesterday, and he trusted it had not failed to exercise the thoughts of another, in all its bearings. No man cherished a higher respect for the legitimate authority of those tribunals before which he was called to practise his profession; but he entertained no less respect for his

moral obligations to his clients. And finally, after a few additional remarks, he stated to the court that he had arrived at the clear conviction that it was his duty to argue the constitutional question to the jury, notwithstanding the decision of a single judge of an inferior grade; and that he should proceed to do so regardless of any consequences. He then turned to the jury, and, undisturbed by the court, began, continued, and ended a most elaborate argument against the constitutionality of the embargo law. Reminiscences of Dexter, by "Sigma," No. 9."

In this case petitioner has been adjudged guilty of making statements and asking questions in defiance of previous rulings of the Court. Actually petitioner did *not* defy any previous ruling of the Court. If he defied anything it was not previous rulings of the Court but previous **"expressions of opinion"** of the Court **by which the Court tried to curb petitioner in functioning effectively as counsel for his client Bridges without making rulings upon which Bridges could base a claim of error on appeal, should be convicted.** Petitioner's action of going forward in the face of such **"expressions of opinion"** did not rise to the level of the acts of defiance of Lord Erskine and Mr. Dexter heretofore mentioned **because in this case there were no rulings to be defied.**

But what petitioner **did do** in this case finds celebrated and glorious precedent in what Lord Erskine did in another case, in the first case in which he appeared after having been called to the bar. namely in the Trial of Captain Baillie.

In that case Captain Baillie was before the Court on a rule to show cause why a criminal information for libel should not be filed against him. Baillie had written, published, and circulated a tract accusing Lord Sandwich, **the First Lord of the Admiralty,** and others with scandalous and fradulent practices in the conduct of Greenwich Hospital, a public trust. The others were officials of lower rank than the Earl of Sandwich. On THEIR complaint the rule to show cause was issued. During his speech to the Court Lord Erskine was interrupted by Lord Mansfield, the presiding judge. We herewith quote from "The Speeches of Erskine", supra, Vol. I, pages 30 and 31 **without adding any emphasis:**

(Here, Lord Mansfield observing the Counsel heated with his subject, and growing personal on the First Lord of the Admiralty, told him, that Lord ——— was not before the Court.)

"I know, that he is not formally before the Court, but, for that very reason, *I will bring him before the Court*: he has placed these men in the front of the battle, in hopes to escape under their shelter, but I will not join in battle with them: *their* vices, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with *me*. I will drag *him* to light, who is the dark mover behind this scene of iniquity. I assert, that the Earl of ——— has but one road to escape out of this business without pollution and disgrace: and *that is,* by publicly disavowing the acts of the Prosecutors, and restoring Captain Baillie to his command. If he does this, then his offence will be no more than the too common one of having suffered his own

personal interest to prevail over his *public* duty, in placing his voters in the Hospital. But if, on the contrary, he continues to protect the Prosecutors, in spite of the evidence of their guilt, which has excited the abhorrence of the numerous audience that crowd this Court; IF HE KEEPS THIS INJURED MAN SUSPENDED, OR DARES TO TURN THAT SUSPENSION INTO A REMOVAL, I SHALL THEN NOT SCRUPLE TO DECLARE HIM AN ACCOMPLICE IN THEIR GUILT, A SHAMELESS OPPRESSOR, A DISGRACE TO HIS RANK, AND A TRAITOR TO HIS TRUST. But as I should be very sorry that the fortune of my brave and honorable friend should depend either upon the exercise of Lord ———'s virtues, or the influence of his fears, I do most earnestly entreat the Court to mark the malignant object of this prosecution, and to defeat it: * * * I beseech you, my Lords, to consider, that even by discharging the rule, and with costs, the Defendant is neither protected nor restored. I trust, therefore, your Lordships will not rest satisfied with fulfilling your JUDICIAL duty, but, as the strongest evidence of foul abuses has, by accident, come collaterally before you, that you will protect a brave and public-spirited officer from the persecution this writing has brought upon him, and not suffer so dreadful an example to go abroad into the world, as the ruin of an upright man, for having faithfully discharged his duty."

James L. High, in his "A Great Chancellor and Other Papers" (1901) has this to say of Erskine's "speech" in this, the *Baillie* case:

> "It is worthy of note that in this, his first speech at the bar, was manifested that fearless and courageous disposition which, throughout his entire professional career, was so marked a trait of his character."

and in commenting on the portion of Erskine's speech which we have above quoted, said:

> "This arraignment of the conduct of the first lord of the admiralty, for bitterness of invective, withering scorn and fearless denunciation, is, perhaps, without a parallel in the English language. It is needless to add that the rule was discharged, with costs."

The "bitterness of invective, withering scorn, and fearless denunciation" of Erskine in the *Baillie* case shrivels to prissy effeminacy the words of petitioner in this case which both the District Court and the Court of Appeals characterize as "vile epithets", "vile vituperations", "inflammatory statements", and the like. And be it remembered that Erskine spoke at a time when the crime of *constructive treason* (which he was instrumental in abolishing) was the established and lavishly employed instrument for silencing and disgracing those who had the courage to speak out against persons of high place and abuses which they fostered.

The fresh example of Lord Erskine's courage and independence at the time of the founding of this Republic, including his defense of the American patriot Thomas Paine on a charge of treason for having published the second part of the Rights of Man,

to his great immediate disadvantage and peril, is a part of the **noble judicial heritage of our nation.**

Can it be that this "land of liberty" has grown so soft, so complacent, so timorous and fearful, so addicted to form to the disregard of substance, that counsel no longer may function **effectively** as counsel without being punished for criminal contempt where to function **effectively** as counsel meets with the pique or displeasure of the judge?

The Sixth Amendment provides in part:

> "In a criminal case the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

In the case of *Glasser v. U. S.*, 315 U.S. 60, the trial Court had, by certain remarks, prompted (but not ordered), counsel for one of the defendants in a criminal conspiracy case to serve also as counsel for another of the defendants, without the expressed approval of that counsel's initial client. All defendants were convicted and the initial client appealed claiming that the trial Court's action in this regard deprived him of his right of counsel as guaranteed by the Sixth Amendment. On *certiorari,* granted "because of the constitutional issues involved", this Court reversed the conviction on the ground that Glasser's constitutional right of counsel had been abridged. During the course of its decision, this Court said:

> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right

granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defense.' 'This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U.S. 458, 462, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." Ibid. pages 69 and 70.

Further on in its decision this Court said:

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty 'is not to be discharged

as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial *or from any of the essential elements thereof,* and with a caution increasing in degree as the offenses dealt with increase in gravity.' Patton v. United States, 281 U.S. 276, 312, 313, 50 S. Ct. 253, 263, 74 L. Ed. 854, 70 A.L.R. 263. *The trial court should protect the right of an accused to have the assistance of counsel.* 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461.

"No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the *court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights.* For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted 'if your Honor wishes to appoint him (Stewart)', and Stewart immediately replied: 'As long as the Court knows the situation. I think there is something in the fact that the jury knows we can't

control that.' The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold that Glasser freely, albeit tactily, acquiesced in the appointment of Stewart *is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.*

"Glasser urges that the court's appointment of Stewart as counsel for Kretske embarrassed and inhibited Stewart's conduct of his defense in that it prevented Stewart from adequately safeguarding Glasser's right to have incompetent evidence excluded and from fully cross-examining the witnesses for the prosecution.

"One Brantman, an accountant known to Kretske and recommended professionally by him to a client, testified that he gave Kretske $3000 on behalf of one Abosketes. He further testified that he did not know Glasser. Stewart secured a postponement of cross-examination for 'In view of the fact that your Honor appointed me for Mr. Kretske, I am not prepared to cross-examine.' " Ibid. pages 71 and 72.

On page 73 of that decision this Court said:

"Brantman was re-called three days later. Stewart declined cross-examination. That this decision was influenced by a desire to protect Kretske can reasonably be inferred from the colloquy between the court and Stewart before sentence was imposed. At that time Stewart told the court that, lest his failure to cross-examine Brantman reflect on Kretske, the reason for his

forbearance was that he feared that Brantman would tell worse lies. But, especially after the intervening testimony of Abosketes, a thorough cross-examination was indicated in Glasser's interest to fully develop Brantman's lack of reference to, or knowledge of Glasser. Stewart's failure to undertake such a cross-examination luminates the cross-purposes under which he was laboring."

On pages 75 and 76 of that decision this Court said:

"The important fact is that no objection was offered by Stewart on Glasser's behalf to the statements complained of, and this despite the fact that, when the court broached the possibility of Stewart's appointment, Stewart told the court that statements of this nature were not binding on Glasser. That this is indicative of Stewart's struggle to serve two masters cannot seriously be doubted.

"There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party *may* conceivably *impair counsel's* effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. **The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising**

from its denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A.L.R. 575; Tumey v. Ohio, 273 U.S. 510, 535, 41 S. Ct. 437, 445, 71 L. Ed. 749, 50 A.L.R. 1243; Patton v. United States, 281 U.S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A.L.R. 263. And see McCandless v. United States, 298 U.S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205. **Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused** by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. *In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is* **especially important** that he be given the benefit of the undivided assistance of his counsel **without the court's becoming a party to encumbering that assistance.** Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as **effective** as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the **effective** assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser."

Had the Attorney Stewart in that case been ordered to represent Kretske as well as Glasser and had he refused to do so upon the ground that to do so would violate Glasser's right to counsel under the Sixth Amendment: would this court have sustained a judgment of criminal contempt against Stewart for such refusal to obey such order? **Most assuredly not.**

In our petition for a rehearing we made the following point and argument (appendix pages 91 to 94) which we here repeat:

"The Sixth Amendment to the Constitution of the United States provides:

> 'In a criminal case the accused shall enjoy the right * * * to have the assistance of counsel for his defense'.

"This provision guarantees to a defendant in a criminal case the right of counsel not only in name but in substance. It guarantees to him the right to the aid of counsel who in presenting his defense is not bound by any rulings of the trial Court other than those which are so explicit as to constitute error on an appeal by him from a judgment of conviction should such rulings be erroneous. He is guaranteed the right of a counsel who is unfettered in the presentation of his defense by *expressions of opinion* by the trial Court which do not amount to rulings and unfettered by *positions* taken by the prosecutor which have not been converted by the trial Court into rulings.

"This provision of the Sixth Amendment not only confers such a right upon a defendant in a criminal

case but, by necessary implication (i.e., necessary to make the provision itself effective), it confers a corresponding right upon attorney who is serving as counsel for a defendant in a criminal case. This is to say, an attorney while serving as counsel for a defendant in a criminal case is guaranteed by this constitutional provision the right to serve as such without being subjected to restraints which are not also and equally imposed upon the defendant, himself. **He has the right to perform the functions of an advocate.**

"The opinion of this Court **reveals on its face** that appellant is being punished for disregarding **"opinions expressed"** by the trial Court and for disregarding a **"position taken"** by the prosecutor.

"The opinion further shows on its face that appellant is being punished for having expressed opinions when, according to this Court, opinions should not have been expressed) where the subject matter of such opinions was subject matter within the *knowledge* of the defendant Bridges and, therefore, within the *knowledge* of appellant, for the purposes of the trial, not as a matter of fact *but as a matter of law, as a matter of legal compulsion.*

"We have hereinbefore mentioned the status of defense counsel in totalitarian countries. *If this opinion is allowed to stand* it will set a precedent for divesting defendants in criminal cases of the right of counsel. It will set a precedent for a trial judge in a Federal Court to say to a defense counsel:

> " 'I am *not going to limit you* in your presentation of the defense. I am not going to make any

ruling, and, more particularly, I am not going to make any *explicit ruling,* to serve as a predicate for a claim of error on appeal by the defendant should he be convicted. But I am going to *express the opinion* to you as an individual that you should not raise any question concerning the character or credibility of any prosecution witness, and you should not do or say anything which runs counter to any position taken by the prosecutor with respect to how the case for the defense should be presented, and you should not give voice to anything which is within the knowledge of the defendant which is not, as a matter of fact, within your own personal knowledge, which in any way reflects upon any witness called or to be called by the prosecution, and I am going to warn you that if you do not comply with this *expression of opinion* as fully as you would if it were an explicit order binding upon the defendant, I am going to find *you* guilty of criminal contempt and I am going to sentence *you* to jail for a period of six months and I am going to order *your* name stricken from the roll of attorneys permitted to practice in this Court.' "

"We raise this point, and especially set up and claim it, in this petition in order to preserve our right to raise this point in an application to the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied."

2. THE COURT OF APPEALS ACCORDED PETITIONER A HEARING IN FORM ONLY AND NOT A HEARING IN SUBSTANCE, ACCEPTING THE ACCUSATIONS OF THE CERTIFICATE AS TRUE WHERE THE RECORD CONCLUSIVELY SHOWS THAT THEY ARE FALSE, AND THEREBY NOT ONLY COMMITTED ERROR WHICH SHOULD BE CORRECTED BY THIS COURT PURSUANT TO THIS COURT'S RULING IN U.S. v. McNABB, 318 U.S. 332, BUT AN ERROR AMOUNTING TO A CONTRAVENTION OF THE DUE PROCESS OF LAW CLAUSE OF THE FIFTH AMENDMENT.

In the case of *McNabb v. U. S.*, 318 U. S. 332, three illiterate youthful hillbilly moonshiners were arrested by Federal officers and were held for several days without being taken before a United States Commissioner, or a judge, during which time they were separately questioned and incriminating statements were obtained from them which were admitted in evidence against them at their trial. They were convicted of murdering a Federal officer, their conviction was upheld by the Court of Appeals and this Court granted certiorari because "the petition * * * presented serious questions in the administration of criminal justice." The petitioners contended that they had been compelled to be witnesses against themselves as prohibited by the Fifth Amendment. After noting the authorities supporting such contention this Court said, commencing on page 340:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' Hebert v. Louisiana, 272 U.S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A.L.R. 1102, which are

secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accomcomodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

(6.7) "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see Nardone v. United States, 308 U.S. 338, 341, 342, 60 S. Ct. 266, 267, 268, 84 L. Ed. 307, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecution." (Citing cases.)

"And in formulating such rules of evidence for federal criminal trials the Court has been guided

by considerations of justice not limited to the strict canons of evidentiary relevance.

"Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances here disclosed must be excluded."

In the *McNabb* case the judgment was reversed because evidence which should have been excluded was admitted. In this case we have the reverse situation, viz. the Court of Appeals ignored matters of record which showed conclusively that the charges of the accuser (i.e., the District Judge) were false and accepted those charges as true, thereby, **in practical and legal effect, refusing to admit or hear evidence which it should have admitted and heard and which established,** not by a preponderance of the evidence and not as a matter of greater credibility but **conclusively, as a matter of official and uncontrovertable record, that those charges were false.**

To what do we refer? For one thing to the statement of the trial Court **"I am not going to limit you * * * Mr. Hallinan."** For another, to the fact that the various remarks of petitioner during his opening statement were not violative of previous ruling of the trial Court in that the previous "rulings" charged to have been violated were either (1) not rulings at all **but mere expressions of opinion,** or (2) **ruling on unrelated subjects or** (3) **positions taken by the prosecutor which were not converted into rulings by the trial Court.** For another, to the fact that on SIX occasions during the cross-examination of the witness

Garner the trial Court was invited or requested to make an explicit ruling forbidding petitioner to continue to ask questions along the two subjects on which he was asking questions and that the trial Court, by its non-action, in legal and practical effect refused to make such a ruling.

But we contend that the action of the Court of Appeals in ignoring such matters of record transcended mere error.

We said in our petition for a rehearing (Appendix pages 94 and 95) and we now repeat:

"The only hearing accorded to appellant as a matter of right by the law is a hearing on appeal in this Court.

"The opinion of this court, *if it is allowed to become the decision of this Court,* will have the effect of depriving appellant of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It will do so by granting to appellant a hearing *in form only* and by denying him a hearing in substance and on the merits.

"It will do so by accepting the charges made by the trial Court as true where the record not only does not sustain such charges but affirmatively establishes that such charges are false.

"We contend that this transcends mere error, that it transcends an error in judgment or in the exercise of discretion, that it constitutes a positive violation of appellant's constitutional right to be accorded due process of law before being deprived of his liberty.

"We raise this point and especially set up and claim it in order to preserve our right to raise this point in an application in the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied."

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3. BY HOLDING THAT AN ATTORNEY MAY BE "IN BAD FAITH" FOR URGING THE DEFENSE USED IN BRIDGES v. WIXON, 326 U.S. 135, THE COURT OF APPEALS IN EFFECT OVERRULES THAT CASE.

a. The Court of Appeals holds that the petitioner acted in bad faith.

The Court of Appeals says:

(p. 2) "At times we make reference to portions of the record not referred to in the certificate; this for the purpose of assisting in our determination of *whether* the conduct of the defendant, upon which the judgment of contempt was predicated, *was in good faith.*

(p. 7) "*No other motive* can be attributed to such statements and conduct than that appellant deliberately sought to *inflame* the minds of the jurors and *unduly prejudice* them in advance of the appearance of any witness on the witness chair.

(p. 8) "Appellant says he had a right to make an opening statement. Of course he had, so long and to the extent it remained within the bounds of propriety and *good faith. We find neither in the conduct* complained of here * * * it is not nonsense from the standpoint of reason and authority to say that in an opening statement you cannot resort to a blanket castigation and vilifica-

tion of witnesses, especially is this true where the vilification and castigation is *an expression of counsel's own opinion.*

(p. 11) "The conduct of appellant in our opinion is *inexcusable* on any of the grounds urged."

b. Petitioner merely followed the defenses raised in Bridges v. Wixon, 326 U.S. 135, on the same issues and the same party litigant.

One of the issues in the deportation proceedings culminating in *Bridges v. Wixon,* 326 U.S. 135, was whether Harry Bridges *was or ever had been a member of the Communist Party.*

United States v. Bridges, No. 32117-H charged Harry Bridges with perjury in having denied that he was or ever had been a member of the Communist Party. One of the issues, therefore, was *whether Bridges was or ever had been a member of the Communist Party.*

In short, the chief issue of the two cases was identical. In the deportation proceedings defendant had raised the defense that hatreds arising from labor disputes had led to a conspiracy to give false testimony against him in order to get rid of him. *Evidence on this subject had been received at the deportation hearing and was part of the record in Bridges v. Wixon.*

This Court held it relevant to the extent of including Bridges' labor union history in its statement of facts. See 326 U.S. 135, 140-141. Justice Murphy wrote a concurring opinion in which he set out at

length the fact that Bridges' activities had antagonized many people, and the persecution to which he was subjected in order to have him deported.

Petitioner tried to outline this very same defense to the jury in the opening statement and to raise it in his cross-questioning of Garner.

For doing so, the Court of Appeals charges him with *bad faith.*

This question is at the threshhold of the case, before we even reach the question whether petitioner's position was correct or incorrect, or whether he should have acquiesced in the trial Court's expression of opinion which did not amount to rulings.

By holding that petitioner was *in bad faith* for reviewing the defenses of *Bridges v. Wixon* the Court of Appeals (a) overrules *Bridges v. Wixon* so far as its statement of facts holds this defense to be relevant and material and (b) *holds that petitioner should have known in advance that Bridges v. Wixon would be overruled!*

c. Importance of issue.

This phase of the case is of utmost importance to the bar throughout the country. *Where a second case involves the same issue and same party litigant as an earlier case, a lawyer assumes that he can follow the holding or language of the earlier case.*

The present decision on the contrary holds that a lawyer may be held in bad faith for attempting to follow the language of this Court in an earlier case involving the same issue and same party.

This issue is of general importance in Federal practice; the Court of Appeals has decided it probably contrary to holding of this Court in *Bridges v. Wixon*, 326 U.S. 135. A writ of certiorari should be granted accordingly.

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4. THE COURT OF APPEALS HOLDS PROBABLY CONTRARY TO THE DECISIONS OF THIS COURT IN HOLDING THAT THE DEFENSE CANNOT ATTACK THE CREDIBILITY OF PROSECUTION WITNESSES IN THE OPENING STATEMENT.

a. The Court of Appeals hold that defense counsel cannot attack the credibility of prospective prosecution witnesses in the opening statement. It says:

> (p. 8) "A trial court has the duty of safeguarding the rights of all parties before it, and the United States of America was party to the criminal action. *Witnesses required to appear are entitled to protection from unjustified character assassination and vilification* and *a court is not in a position to determine the extent to which it may properly allow counsel to comment upon the character of a witness or the weight and credibility of his testimony until the witness has testified.*"

b. *This is an important point of federal practice.* Where, as here, the defendant receives permission to make his opening statement immediately after that of the prosecution, the normal purpose is **to put the jury on guard against the prosecution's case as it goes in.** Attacking the credibility and truthtelling character of prosecution witnesses **is a legitimate defense and one which would entitle the defendant to an acquittal if the jury found favorably upon it.** If this may be shown

in evidence, it should be allowed in an opening statement. So far as we know, the question has not yet been determined by this Court. That is the first reason for granting certiorari.

c. The second reason is that the Court of Appeals' holding is probably contrary to general principles laid down by this Court.

The Court of Appeals says that the protection to which a witness is entitled prohibits comment on his credibility until *after* he has testified.

An analogous point was decided contra in *Alford v. U. S.*, 282 U.S. 687. There the Ninth Circuit likewise had held that a witness was entitled to protection against questions on cross-examination which might tend to discredit him, "unless such testimony is reasonably called for by the exigencies of the case." (*Alford v. U. S.*, 41 F. (2d) 157, 160.) Accordingly, the Circuit Court held that the witness was entitled to protection against discrediting *exploratory* questions on cross-examination.

This Court reversed, holding that *a witness is not entitled to protection* except against "invasion of his constitutional protection from self-incrimination properly invoked" and questions put "merely to harass, annoy or humiliate him". (*Alford v. U. S.*, 282 U.S. 687, 694.) At the same time it held that cross-examination was properly exploratory. (*Alford v. U. S.*, 282 U.S. 687, 692.)

In other words, the cross-examiner has a right to ask questions likely to discredit the witness, even if he does not know the answers in advance.

By the same logic, the opening statement may outline a defense which tends to discredit the prosecution's witnesses. The defense need not wait until the witnesses have testified and all the answers are in. *An opening statement may discredit prosecution witnesses even though the trial itself must tell how far counsel can sustain such a defense.*

d. The foregoing point also determines whether the present case is governed by *Fisher v. Pace,* 336 U.S. 155. That case upheld the contempt judgment against the attorney on the ground that in his opening statement he tried to talk about matters which *could not under any circumstances* be told to a jury under Texas law (the overall result of the case—Texas juries are limited to special findings).

The Court of Appeals tries to bring itself under that case without expressly mentioning it.

If (as we submit) an attack on the prosecution witnesses *may properly be made in an opening statement,* then the holding of *Fisher v. Pace* does not apply to this case.

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5. THE PRESENT DECISION CONFLICTS WITH THAT OF THE FOURTH CIRCUIT IN SPRINKLE v. DAVIS, 111 F. (2d) 925, 930.

So far as the contempt judgment is based on the cross-examination of Garner, the present decision conflicts with that of the Fourth Circuit in *Sprinkle v. Davis,* 111 Fed. 925, 930. This Court says (p. 11) "We fail to find in the cited cases a comparable situation to the case at bar". But actually the facts of *Sprinkle v.*

Davis, 111 Fed. 925, 930 were strikingly similar. The defense attorney tried to introduce the transcript of a previous trial. The judge ruled that the transcript could be used only as impeachment. The attorney renewed his attempts until the judge said he had warned him **"half a dozen times"** and finally threatened him with contempt.

The Fourth Circuit held that the repeated attempts to use the transcript did not constitute contempt; on the contrary, the judge's **threat of contempt** (in the jury's presence) **was reversible misconduct.**

The parallel with the present case could hardly be closer: (a) the ruling came on cross-examination; (b) it came from the attempted use of a transcript of an earlier trial (c) which, the trial judge said, could be used only for impeachment; (d) the number of repetitions **("half a dozen")** was substantially the same here, where petitioner asked **six** questions on one subject (*Bridges v. Wixon*) and **eight** on the other (conspiracy against Bridges).

While the Court purports to distinguish that case, it actually decides contrary to it, creating a conflict with the Fourth Circuit.

The Ninth Circuit has also repudiated, *sub silentio,* its own holding in *Meeks v. U. S.,* 163 F. (2d) 598, 601, which follows *Sprinkle v. Davis,* 111 Fed. 925, 930.

6. THE COURT OF APPEALS VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST AMENDMENT.

The Court of Appeals has infringed petitioner's rights under the First Amendment in that it has punished him for speech, some of which was necessary under its own decisions and all of which was proper.

Fisher v. Pace, 336 U.S. 155, was brought up from a state Court because the attorney claimed violation of his constitutional rights of free speech. The conviction was affirmed on the theory that he was trying to say something which under Texas law was never proper in a jury trial. By implication, the question of violation of the right of free speech was left open as to matters which *might or might not be proper depending on circumstances. Bridges v. California,* 314 U.S. 252, finds a violation of the free speech guarantee in punishing statements made *outside* of the courtroom. There is apparently no quarrel with the statement of the dissent in *Fisher v. Pace,* that "Freedom of speech in the courtroom deserves the same protection". (336 U.S. 155, 163.) In the present case, the Court punished appellant for speech which under earlier decisions including those of the Ninth Circuit, was either necessary or at least proper.

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a. Previous Ninth Circuit decisions require further questions after objection sustained to initial question on cross-examination.

In *F. & D. Co. v. Lindholm,* 66 F. (2d) 56, 60, the Ninth Circuit held that the cross-examiner had an in-

sufficient record on appeal if he desisted after objection was sustained to his first question on a subject on cross-examination. He *should have asked further questions* and made an offer of proof. In *Gianotos v. U. S.*, 104 F. (2d) 929, 933, the cross-examiner got an evasive answer, which, however, the trial judge held sufficient. The Ninth Circuit Court of Appeals held that the defendant could not complain of error, sinc he had not asked further questions on the same subject.

Consequently, when petitioner continued asking further questions of Garner after objection had been sustained to his first ones, *he was merely following the procedure laid down in the Ninth Circuit.* To punish him for his questions under these circumstances certainly violates the guarantee of the First Amendment.

The Ninth Circuit seems to require *both further questions* and an offer of proof on cross-examination, although the Court itself has commented on the anomaly of offers of proof on cross-examination. *(Brett v. U. S.*, 86 F. (2d) 305, 307.) Other circuits hold that offers of proof do not apply on cross-examination at all. *(Burt v. U. S.*, 139 F. (2d) 73, 75 (C.C. A. 5); *Powhattan Mining Co. v. Ickes*, 118 F. (2d) 105, 110 (C.C.A. 6).)

In short, asking further questions on cross-examination after objection sustained was something which petitioner *had* to do. Punishing him for doing it infringes his freedom of speech under the First Amendment.

b. It was proper to make opening statement and have evidence ruled on as it is offered.

The defendant is entitled to an opening statement. (*Sunderland v. U. S.*, 19 F. (2d) 202 (C.C.A. 8).) The Court of Appeals admits that much. (Appendix, p. 104.) If the opening statement is made in good faith, it should be allowed to proceed. Disputed questions of evidence may be ruled upon when the evidence is offered. (53 *Am. Jur.* 358; *U. S. v. Feinberg*, 140 F. (2d) 592, 595 (C.C.A. 2); *People v. Searcey*, 121 Cal. 1, 5, 53 P. 359; *State v. Heinz*, 223 Iowa 1244, 275 Mi. 10, 114 A.L.R. 959, 968.)

We have already discussed the charges that petitioner acted in "bad faith" and that an attack on the credibility of prosecution witnesses is *per se* objectionable.

Aside from that, the opening statement set forth a defense which might be upheld, and, therefore, could reasonably be thought to be proper. This was especially true for the many ramifications of the conspiracy against Bridges. The Ninth Circuit has held (in connection with offers of proof) that a large volume of evidence must be offered piecemeal and each item ruled on separately. (*Lane v. U. S.*, 142 F. (2d) 249, 253.) An opening statement is basically similar to an offer of proof. Accordingly, petitioner was justified in stating *all the phases* of his proposed defenses, so as to have them *all* before the Court, rather than dropping them as soon as an objection had been sustained to one phase. Since the course which appellant followed on the opening statement *could reasonably be held proper and even necessary* under the authori-

ties, it was a violation of the First Amendment to punish petitioner for the same.

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7. THE COURT OF APPEALS ERRONEOUSLY APPLIES SUMMARY CONTEMPT PROCEDURE TO A SITUATION WHERE (a) THE TRIAL JUDGE ONLY CERTIFIED THAT PETITIONER'S ACTS IF CONTINUED MIGHT TEND TO DISRUPT THE TRIAL AND (b) DELAYED SENTENCE UNTIL A LATER DAY.

The trial judge proceeded against petitioner summarily under Criminal Rule 42(a). The Court of Appeals affirmed largely on the strength of *U. S. v. Sacher,* 182 F. (2d) 416, *which is itself now pending on petition for certiorari in this Court.* (October Term 1950, No. 201.)

For two reasons petitioner contends that there was no jurisdiction to proceed against him summarily: (a) the trial judge did not certify that defendant had disrupted the judicial proceedings or had even made disruption imminent, but certified only that defendant's actions *"if allowed to continue without comment* on my part or official judicial action, *might well disrupt* the orderly processes of this trial (R.T. p. 773); (b) the trial judge delayed his proceedings for a day or more after the occurrences which he attempted to punish.

Petitioner made his opening statement on November 17 and 18; the cross-examination of Garner took place on November 21 and was followed by part of the testimony of Schumacher. The contempt sentence was imposed summarily on November 22.

Ex parte Terry, 123 U.S. 289, 314, expressly left the question open whether summary proceedings could be used "at a subsequent term or subsequent day of the same term." This reservation was confirmed in *Pendergast v. U. S.,* 317 U.S. 412, 419.

All subsequent dicta of this Court have been *against* the power to punish summarily except for "misconduct in open court in the presence of the judge *which disturbs the court's business* * * * and where immediate punishment is essential to prevent demoralization of the court's authority before the public." *(In re Oliver,* 333 U.S. 257, 275.) To the same effect is the dictum in *Cooke v. U. S.,* 267 U.S. 517, 536.

The advisory committee's notes to Rule of Criminal Procedure 42 (b) say that it was intended to codify the rules announced by Chief Justice Taft in the *Cooke* case. Consequently these dicta may be taken as a guide in determining the intended and therefore the operative scope of Section 42(a).

We also call attention to the analysis entitled "Summary Contempt: A Sword or a Shield?" in 2 Stanford Law Review, 763 (July 1950). This article collects the cases and comes to the conclusion (a) that before *U. S. v. Sacher,* 182 F. (2d) 416, the decisions *never* permitted summary proceedings to be used after a delay *except where defendant himself had brought on the delay by absenting himself;* that the same considerations apply to delayed proceedings and as to proceedings for contempts out of the presence of the Court, and consequently such prosecution should be

on notice and hearing. Justice Holmes' dissent in *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402, may also be deemed authority, since the majority opinion was overruled in *Nye v. U. S.*, 313 U.S. 33, 52. Justice Holmes analyzes the statute and comes to the conclusion that its provisions (p. 423)

> "point only to the present protection of the court from actual interference, and not to postponed retribution for lack of respect for its dignity. * * * Without invoking the rules of strict construction, I think that 'so near as to obstruct' means so near as actually to obstruct—and not merely enough to threaten a possible obstruction * * * Misbehavior means something more than adverse comment or disrespect."

> (p. 425) "I would go as far as any man in favor of the sharpest and most summary enforcement of orders in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts."

While the above language was used with reference to an indirect contempt, its logic applies equally to a contempt, which though in the Court's presence, does not interrupt the proceedings.

In re Maury, 205 F. 626, cited both in *Hallinan v. U. S.* and *U. S. v. Sacher*, treats *Ex parte Terry* as deciding the very question which it left open. Moreover, the *Maury* case was decided before *Nye v. U. S.*, 313 U.S. 33, clarified the law, overruling *Toledo Newspaper Co. v. U. S.*, supra.

Finally, as pointed out in 2 Stanford Law Review, 763, 765, the defendant there had a rudimentary hearing.

All the pronouncements of this Court (dicta in *In re Oliver,* 333 U.S. 257, *Cooke v. U. S.,* 267 U.S. 5, 7, Justice Holmes' dissent in the overruled *Toledo Newspaper Co. v. U. S.,* 247 U. S. 402 are against the use of summary contempt under either of the circumstances existing in this case. Not only were the proceedings delayed (showing that there was no immediate disruption) but the judge certified only that such disruption "might well" occur *if* he took no legal measures. *Taking legal measures includes contempt proceedings on notice and hearing.* A contingency such as the certificate mentions, in terms does not require summary measures. The judge does not even say that disruption was imminent. Under these circumstances, we submit that *the face of the certificate shows the case was not one punishable summarily.*

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8. THE COURT OF APPEALS DECIDED CONTRARY TO UNITED MINE WORKERS v. U. S., 330 U.S. 258, 302, IN NOT ITSELF PASSING ON THE PUNISHMENT.

In *United Mineworkers v. U. S.,* 330 U.S. 258, 302, this Court said that the judgment involved both civil and criminal contempt. It then made its own decision as to what was a proper punishment, and reduced the trial judge's sentence accordingly. The Court of Appeals, however, treats the penalty as something at the

trial judge's discretion, thus going contrary to the *United Mineworkers'* decision.

---

9. IN REFERRING TO UNCONNECTED CONTEMPTS THE COURT OF APPEALS HOLDS CONTRARY TO CASES LIKE BOYD v. U.S., 142 U.S. 450, 458.

It is trite that a defendant must be convicted only upon the crime with which he is charged, not because of other unrelated offenses. *(Boyd v. U. S.,* 142 U.S. 450, 458; *Coulsten v. U. S.,* 51 F. (2d) 178, 180 (C.C. A. 10).) Yet the Court of Appeals does what every jury is forbidden to do when it refers to two contempt convictions of petitioner occurring respectively 17 and 24 years before. If such considerations make a trial unfair, they equally make the hearing before the Court of Appeals unfair. (In summary contempt the Court of Appeals hearing is the first adversary hearing which is accorded to the defendant.)

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10. THE COURT OF APPEALS FAILS TO DECIDE THE EFFECT OF THE DISBARMENT NOT INCORPORATED INTO THE WRITTEN JUDGMENT.

The Court orally ordered petitioner's name to be stricken from the roll of attorneys entitled to practice before the District Court of the Northern District of California. (R.T., p. 848.) It did not incorporate this provision into the written judgment. (C.T., pp. 50-51.) Disbarment cannot be imposed summarily. *(Ex parte Robinson,* 86 U.S. 505.)

The Court of Appeals left the effect of the oral order undecided. Certiorari should be granted to pass upon that important issue in the appeal.

Dated, San Francisco, California,
September 8, 1950.

Respectfully submitted,
WILLIAM F. CLEARY,
GEORGE OLSHAUSEN,
ROBERT W. KENNY,
Attorneys for Petitioner.

(Appendix Follows.)

No. 12,424

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT HALLINAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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Note: All underlining and typewritten matter added by petitioner to correct typographical omissions and mistakes. Such corrections were not in petition as filed in the Court of Appeals

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VII.

This Court should grant a rehearing in this case because this Court in the present opinion has failed to pass on or mention the appeal of appellant from the order of the trial court striking the name of appellant from the roll of attorneys permitted to practice as attorneys in the trial court 91

VIII.

This Court should grant a rehearing in this case because it has failed in the present opinion to pass upon the issue raised by appellant that the trial court, by reason of lapse of time had lost jurisdiction to certify appellant in criminal contempt under Rule 42(a) for matters occurring during the opening statement 91

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
June 21, 1950.

WILLIAM F. CLEARY,
Of Counsel for Appellant and Petitioner.

No. 12,424

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT HALLINAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

I.

PRELIMINARY STATEMENT.

With but one exception, all of the numerous instances of asserted contempt found by the trial Court and affirmed by this Court, consist of instances in which statements made or questions asked by appellant are said to have been made or asked in disregard

and defiance of previous rulings of the trial Court foreclosing appellant from making statements or asking questions of the character actually made or asked.

We will show, in this petition, that in not so much as a single one of the instances of asserted contempt mentioned in this Court's opinion was there a previous ruling foreclosing appellant from making a statement or asking a question of the character held to be contumacious. We will show, also, that only by assembling out of context and in foreshortened form unrelated matters in such a way as to indicate that they are related, and by intermixing therewith opinions of and charges made by the trial Court which are not substantiated by the record and "positions" taken by the prosecutor is any semblance of contumacious conduct made to appear. *We will show, also that a careful reading of this Court's opinion discloses that the above stated things are so.*

The one exception heretofore mentioned is the incident dealt with in the next to the last paragraph on page 6 of the printed opinion. We will show by the record that the remark therein quoted was not made in the hearing of the trial Court and could not have disrupted, or been intended to disrupt, the proceedings in the trial Court.

We will show, also, that the points on which this Court bases its conclusion that there was a lack of good faith on appellant's part are not well taken.

We will, in addition, restate certain points heretofore made and raise certain other points which could

not have been raised prior to the filing of this Court's opinion. The later points are raised in this petition to preserve our right to raise them in the Supreme Court.

II.

THE OPENING STATEMENT.

This Court divides all of the asserted contumacious acts of appellant during the opening statement into four categories, namely: statements relative to labor disputes; attacks upon the credibility and character of anticipated opposing witnesses; asserted wire-tapping and espionage by agents of the government; and the two incidents mentioned at the bottom of page 6 of the printed opinion. We will deal with these in the order selected by the Court.

A. UNION LABOR DISPUTES.

This Court discusses eight separate incidents under this category. We will deal with these in the order selected by this Court. In addition, this Court, in discussing the first of such incidents, makes reference to three previous instances. We will deal with these previous instances in our discussion of the first incident.

THE FIRST INCIDENT.

The first incident of asserted contempt upon the part of the appellant recited by this Court is stated on pages 2 and 3 of the printed opinion as follows:

"The rulings and assertions made during appellant's opening statement contain several lines of thought. For clarity we consider these rulings and assertions separately according to the subjects with which they deal. The first of these subjects is labor union disputes.

"In pronouncing the judgment of contempt the Court states: *'Mr. Hallinan, unbridled again, lapsed into a violation of the orders. At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in on an opening statement and to matters which should not have been brought before the jury.'** The record pertaining to this incident shows the following:

"In the course of his opening statement appellant stated: 'Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have already observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.' The Court thereupon 'admonished' appellant that 'we are not trying warfare or alleged warfare between any union or any group and the like.' While the certificate makes no reference to prior admonitions the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activities in which

*Emphasis ours throughout unless otherwise noted.

> Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the court."

Did appellant in this instance, as charged by the trial Court and impliedly held by this Court, "lapse into a violation of the orders" previously given by the trial Court?

Concerning this matter this Court says:

> "While the certificate makes no reference to prior admonitions the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activities in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the court."

An *expression of opinion* by a trial Court may or may not amount to an order, ruling or admonition. The test is whether what the trial Court says forecloses a litigant from going forward on the subject mentioned by the trial Court. If the *litigant* is not foreclosed, *his attorney* is not foreclosed, for it is through his attorney that a litigant speaks.

In none of the three previous instances mentioned by this Court did the *expression of opinion* of the trial Court amount to an order, ruling or admonition foreclosing *the defendant Bridges* from making further comments in his opening statement on union labor disputes.

A search of the record reveals three and only three previous references by the trial Court to the subject of labor union disputes.

The first of such three previous instances appears on page 499 of the transcript. It reads as follows:

> "And without interrupting you unduly, we full well appreciate the genesis behind the labor movement in the United States, as well as in the State of California; and perhaps the waterfront travail that is written large in the history of this city as well as the state. Much of it is now written in granite, probably, in the history of this state. *I cannot see altogether at this juncture,*—I am not interrupting you unduly, *I want to feel the matter out as we go along,—I cannot feel at this juncture* how this historical narrative, however interesting it may be to all of us, would tend to prove or disprove any of the material allegations in this indictment contained."

A discussion followed in which union labor disputes were not again mentioned and which was closed by this statement at the bottom of page 500 of the transcript:

> "The Court. We will take a recess and *you think that over for a few minutes.*" (Emphasis added.)

The expressions by the trial Court, "I cannot see altogether at this juncture"; "I want to feel the matter out as I go along"; "I cannot feel at this juncture" and "you think that over for a few minutes" show not *decision* but indecision. There was not only no order, ruling or admonition but the "*opinion ex-*

pressed", if it can be said to be an opinion expressed, was not positive: it indicated no more than an inclination.

It left the matter open.

Observe that there was no mention of inflammatory matter or of vile epithets in this instance.

The second of such three previous instances commences on page 516 of the transcript. It reads as follows:

> "Now, how far you may go in an opening statement concerning the narrative background with respect to Mr. Bridges' benign influence on the waterfront will not affect the ultimate issue at bar, 'Did Mr. Bridges swear falsely?' I full well recognize, many people in this jurisdiction feel that he has had a benign influence on that waterfront; that he has done certain things for the working people there; other people feel directly to the contrary. And I think we had an exposition of that from our jury, in selecting these people. In a very forthright manner. Some said that they were prejudiced, others said that they had an open mind.
>
> "Now, *to take us back into the gory days of the bloody warfare on that waterfront and raise matters of hysteria and inflammatory matter* before this jury *is not going to answer this case, in my humble opinion.*"

This statement was made during the course of a discussion, in the absence of the jury, between the Court and counsel which commenced on page 511 and ended on page 540 of the transcript. It was both in

form and nature an argument looking *in the direction of a possible or likely order*, ruling or admonition and not in the form or nature of an order, ruling or admonition *in and of itself*. The expression "is not going to answer this case, in my humble opinion" reveals that this is so.

"* * * is not going to answer this case" is both an ambiguous and argumentative statement. We assume that the trial Court meant by it "is not going to be the *determining factor* in this case." But defense counsel is not limited in an opening statement to the mention of matters which in the "humble opinion" of the trial judge will be *the* determining factor in the case. Moreover, the words "in my humble opinion" are inappropriate for an order, ruling or admonition or for an assertion *intended to be taken for or understood to be* an order, ruling or admonition.

Again the matter was left open.

Note that in this instance the trial Court recognized that there had been gory days of bloody warfare on the waterfront and in effect charged that to mention such matters would be inflammatory and raise hysteria. But it was at the time of those gory days of bloody warfare that Bridges was charged with having become a member of the Communist Party. Such charge could not be proved without taking "us back" to those gory days of bloody warfare.

The third of such three previous instances appears on pages 526 and 527 of the transcript. It reads as follows:

"The Court. I hold, gentlemen, as a matter of law, that the bulk of the opening statement thus far is immaterial to any rationalization of the charges at bar. I agree with counsel for the government that matters of interrogation of witnesses may be gone into; certainly impeachment may be indulged in to your heart's content, Mr. Hallinan. *You may cross examine without limitation on your part.* I believe in latitude on a cross examination. But to have this Court sit while you dilate upon matters that pertain to waterfront problems, trade union problems, employer-employee relationships, is to degenerate this case into a hearing far divorced from the indictment which is before me."

This statement of the trial Court has the *superficial* appearance of being an order, ruling or admonition foreclosing appellant from making further mention of labor union disputes during the remainder of the closing statement. On closer inspection, however, it clearly appears that the trial Court in this statement made two qualifications (probably for the purpose of saving itself from error should this Court on an appeal by the defendant Bridges from a judgment of conviction be of the view that the defendant Bridges had the *legal right,* in his opening statement, to inform the jury that he intended to prove that the charges made against him were false and that they had been fabricated, in part, by disgruntled former members of his own union and by rival union labor leaders in an attempt to "get even with him" or just to "get him"). The two qualifications are the phrases

which we have caused to be printed in bold-face type, namely, "the bulk of" and "dilate upon".

The word "bulk", as used in this connection, means "the greater or principal part; main body; majority". It does *not* mean the whole or entirety. By the use of the phrase "the bulk of" the trial Court left *unidentified* the portions of the "opening statement thus far" which the trial Court considered to be irrelevant. As a result, the sentence in which the phrase "the bulk of" is contained did not condemn, *either as to the past or as to the future* any particular subject matter theretofore mentioned by appellant in the opening statement. More particularly, it did not foreclose appellant, as the attorney for the defendant Bridges, from making further reference *to the subject of labor union disputes.*

The word "dilate" is defined as *"to enlarge in all directions; swell;* spread or puff out; *distend; expand".* As a result, the sentence in which the phrase "dilate upon" is contained did not prohibit all reference to labor union disputes in the portion of the opening statement still to come, but only such enlarged, swelled, spread, distended and expanded reference to that subject as would "degenerate this case into a hearing far divorced from the indictment which is before me".

In this instance, despite the otherwise positive form of the statement, there was no *definite* order, there was no *definite* ruling, there was no *definite* admonition, there was, *at most,* what this Court calls an *"ex-*

*pressed * * * opinion"* by the trial Court. Because of the two qualifying phrases the defendant Bridges could not successfully claim, *on an appeal by him from a judgment of conviction,* that the trial Court, *by what it said,* foreclosed him from making further mention of labor union disputes in the opening statement. If the defendant Bridges was not so foreclosed, then appellant, the attorney for the defendant Bridges and the only person through whom defendant Bridges could speak, was not so foreclosed.

Again the matter was left open.

Observe that in this instance the comment of the trial Court was made in the absence of the jury and was not directed to any particular statement by appellant. Thus there was no vile epithet or inflammatory matter in this instance.

An examination of these three previous instances reveals that the trial Court's statement that "Mr. Hallinan, unbridled again, lapsed into a violation of the orders.", is not only not substantiated by the record, *but that the record shows that there were no previous orders on this subject* **to be violated.**

From the foregoing we see that when appellant said "Now, Mr. McMillan says that they will bring into this trial certain labor leaders, formerly associates of Mr. Bridges. Unfortunately they will, because the labor movement, as you may have already observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.",

Appendix page

he did not, as charged by the trial Court and impliedly found by this Court, lapse into a violation of orders previously made by the trial Court. In other words, there were no previous orders to serve as predicate for the finding that the foregoing statement by appellant was contumacious. *Moreover, that there was nothing of an* **inflammatory** *nature in that statement is self-evident. Nor were any vile epithets hurled.* In addition, such statement was in direct response to the following statement made by government counsel in the opening statement of the prosecution on page 485 of the transcript:

> "We shall show the extreme care and caution which both the defendant Bridges and the Communist Party exercised over the many years of his membership to conceal that fact, even from the rank and file of its own membership. *We will prove it by the positive testimony of men and women who, by reason of their position* **in certain labor organizations** and by reason of their own position in the Communist Party, are able to testify to and will so testify positively, to the fact that defendant Bridges during the period alleged in the indictment was a member of the Communist Party of the United States."

We now turn from the three previous instances mentioned by this Court to the first incident, itself, and ask this question:

Did the trial Court in this incident make a ruling of such a character as to foreclose appellant from making further mention of labor union disputes during the opening statement?

The answer to this question is likewise "no!"

So that this will be unmistakably evident, we herewith quote this entire incident as it appears on pages 550 and 551 of the transcript:

"Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have all observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.

Mr. McMillan. *If your Honor please, is that a statement of what they expect to prove?*

Mr. Hallinan. Yes, certainly.

Mr. McMillan. *It seems to me that it is an argumentative statement.*

Mr. Hallinan. Oh, it is not. We are entitled to show the quarrels between these labor unions as modifying and explaining the witnesses who take the stand.

The Court. I will interrupt you momentarily, Mr. Hallinan, to admonish the jury and admonish you that we are not trying warfare or alleged warfare between any union or any group and the like. This case involves Mr. Harry Bridges, Mr. Robertson and Mr. Schmidt. Witnesses will be produced here. Now, the general trend of this opening statement is purely speculative, *so far as the Court is concerned.* It appears to be a blanket assertion of an attempt on Mr. Hallinan's part to discredit all the witnesses produced by the Government in one fell swoop. *I am not going to limit you* but, Mr. Hallinan, I say to you again it is not serving any particular purpose to

> the Court—*it may to the jury,* but I doubt it—to have these blanket assertions made. I think in the final analysis you should reserve your closing argument to the close of this case, realizing your extreme eloquence. *At the present time, may I suggest that you give an outline of what you have in mind?"*

This Court quotes the trial Court as certifying:

> "At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in an opening statement and to matters that should not have been brought before the jury."

The record as above quoted reveals that Mr. McMillan made no objection (he merely asked a question and made a surmise) and that the trial Court did not sustain any objection.

It is true that the trial Court did admonish the jury and appellant that "we are not trying warfare or alleged warfare between any union or any group or the like" but that was not the sustaining of an objection. Moreover, it did not, either in terms or by implication, say that appellant's statement made reference "to matters which should not have been brought in an opening statement and the matters which should not have been brought before the jury", nor did it, either in terms or by implication, foreclose appellant from making further mention of labor union disputes.

That this is so is made unmistakably manifest by the trial Court's statement (which this Court neglected

to mention) that **"I AM NOT GOING TO LIMIT YOU * * * MR. HALLINAN * * *"**.

The trial Court in the certificate charges, and this Court in its opinion implies, that in this incident the trial Court placed a limitation on appellant. The record *affirmatively* discloses that the trial Court not only did not place a limitation on appellant, ***but stated in so many words that it was not going to place a limitation on appellant.***

Even the qualification made by the trial Court (i.e., "but * * * I say to you again it is not serving any *particular* purpose to the Court—***it may to the jury*** but I doubt it—* * *") by the word "particular" and by the clause "it may to the jury" left the matter of labor union disputes open for further mention by the appellant.

That this matter was left open is further revealed by the last sentence of the trial Court's statement in this incident, i.e.: ***"At the present time may I suggest that*** **you give an outline of what you have in mind?"**

This statement, in the form of a question, called upon appellant at that time, and in the presence of the jury, to give an outline of his reason for contending that the discussion of labor union disputes was relevant and material and proper in an opening statement.

The record discloses that as soon as the trial Court made that request appellant proceeded to give the

Court an outline and explanation of what he had in mind in that respect. The first two paragraphs of appellant's outline or explanation appear on pages 551 and 552 of the transcript as follows:

> "Mr. Hallinan. Very well, Your Honor; but Your Honor has very accurately defined the purpose. Every witness that the prosecution will produce will be impeached in advance by the interest, the motive and his prior conduct to Harry Bridges, and that is all I want to tell the jury. In other words, I want the jury to look at these witnesses as they take the stand and not be deceived, but reserve judgment as to whether we will not show those things.
>
> *"I suppose if I deceive this jury, or if I say something that I can not prove to the extent that I have promised to prove it, then my credit with the jury and the credit of the entire defense lapses. And I am willing that that should be so.* Now, I can't see how I could be more sincere than that. And I will also say this, Your Honor, that if the Reporter takes down the statements that I am making, at the end of this case the jury, yourself and the prosecutors will admit that every word of it has been properly introduced in evidence."

Both the trial Court and counsel for the government allowed this explanation to stand without challenge or comment. Appellant was not forbidden to proceed along the lines indicated by him. On the contrary, he was, *by the silence of the Court, by the apparent acquiescence of the Court,* given permission to proceed along those lines.

We note that this Court does not directly hold that in this incident the trial Court made an order, ruling or admonition foreclosing appellant from making further mention of labor union disputes. We note that all that this Court directly holds in this respect is that

> "* * * the record discloses that *this* is the *fourth* time after appellant began his opening statement that the trial Court expressed the opinion that historical accounts of labor union activities in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the Court."

As there is no order, ruling or admonition in this first incident foreclosing appellant from further mention of labor union disputes it follows that this incident cannot correctly be made the predicate for a holding that appellant was guilty of contempt in making further references to that subject in the opening statement.

Note that what appellant said in this incident was not in the least bit inflammatory and that he hurled no vile epithets. Such hurling as was done was done by the trial Court in saying that appellant was trying to destroy all Government witnesses "in one fell swoop".

SECOND INCIDENT.

The second incident is recited by this Court as follows:

> "Subsequently, appellant again began a recital of a history of the growth of the C.I.O., and its expulsion from the A.F.L., which was said to

have been accompanied by charges that the C.I.O. and certain of its leaders, including Bridges, were communistic. This recital was objected to and the objection sustained."

The record account of this incident, beginning on page 553 and ending on page 554 reads as follows:

"Mr. Hallinan. * * * This source of witnesses that counsel has told you he is going to produce here, comes very close to the matter that I am now going to discuss with you. I have said that a certain company union had existed on the waterfront and was replaced by an American Federation of Labor union, and then the American Federation of Labor assigned a certain committee called the Committee for Industrial Organization under John L. Lewis to organise industries on a total basis. We all know prior to that time most unions were local craft unions, rather loosely amalgamated, and they were not industrial unions. But the new union under the NRA matter, the CIO, the Committee for Industrial Organization, became very active and very successful and finally some difficulty—we won't inquire into that unless it be considered argumentative—caused the American Federation of Labor to quarrel with the CIO and ultimately to expel them. The CIO was then considered what is called a leftwing organization, democratic, with no discriminations against anybody for race, religious belief or political belief, and it was called by the A. F. of L. Communistic.

And Harry Bridges, who was then an officer of the A. F. of L., was expelled from the Union as Communistic, *because* he encouraged the amalga-

mation of the Longshoremen with the CIO. There again, a great——

Mr. McMillan. May it please your Honor, we are obliged—patience has always been a very predominant feature in my nature, but I can't let these matters go by.

The Court. The objection is sustained." (Emphasis added.)

The statement by appellant had proceeded for six sentences. No objection was made to any of the first five of these sentences. The objection was to the sixth sentence and, it would appear, not to appellant's mention of labor union disputes as such (*and certainly not to appellant's admission that Bridges was expelled from the union as Communistic for such an admission militated in favor of the prosecution and against the defense*) but to appellant's assertion that Bridges was expelled from the union "*because* he encouraged the amalgamation of the Longshoremen with the CIO".

Be it noted that neither the ground nor the scope of Mr. McMillan's objection was stated either in the objection of itself or in the trial Court's ruling. As a result appellant was entitled to assume that the objection was to the last remark, that the ground of the objection was that the remark was argumentative and that the trial Court sustained the objection on that ground and solely on that ground. Certainly appellant was not required to assume that the objection ran to the entire six sentences or to the mention of union labor disputes where there was nothing stated in the objection to so indicate and where the trial Court

just three pages of the transcript preceding the objection had stated, with reference to the subject matter of union labor disputes, that *it was not going to limit appellant.*

Note that there was no inflammatory matter or vile epithets in this incident.

THIRD INCIDENT.

The third incident is recited by this Court as follows:

> "The Court, in its certificate, then refers to a long dissertation by appellant concerning 'some internal warfare between the C.I.O. and the A. F. of L.' It appears of record that immediately after the sustaining of the above objection, appellant made some statement concerning the affiliation of Bridges' I.L.W.U. with the C.I.O. and began a further discussion of a Maritime federation of the Pacific. Objection was again made and sustained."

The record account of this incident beginning on page 554 and ending on page 555 of the transcript is as follows:

> "Mr. Hallinan. Getting away from that point of it and coming directly to a witness who will be brought in here, and to two other witnesses who will be the agents of that particular witness, the difficulty as to what master organization these unions would associate with being resolved by the longshoremen, the ILWU, in favor of the Committee for Industrial Organization, by an enormous vote that union left the American Federation of Labor and associated with the Committee

for Industrial Organization. A number of unions along the Pacific Coast engaged in maritime and longshore work had been amalgamated for some years in a federation called the Maritime Federation of the Pacific. The longshore workers' union was the largest of the——

Mr. McMillan. May it please your Honor again, I object to this *historical matter*. I can't for the life of me see at any stage of this case where this *historical situation* would be admissible.

Mr. Hallinan. If counsel would give me five minutes, I will show him in an instant and I will define one of his witnesses for him within the five minutes.

Mr. McMillan. Well, may it please your Honor, the difficulty about this whole matter is, *it is historical and it is argumentative;* it properly belongs in an argument, not an opening statement. *In an opening statement it is not intended to take a* shotgun——

The Court. The objection is sustained."

The trial Court's ruling was in response to Mr. McMillan's objection. Mr. McMillan objected that what appellant had just said related to a historical situation, was argumentative and was in the nature of a shotgun discharge. The trial Court made no ruling until Mr. McMillan uttered the word "shotgun". Being in response to Mr. McMillan's objection, the trial Court's ruling was to the effect that what appellant had just said was *too broad and too general* in character and that appellant should be *more specific;* that he should not spread his shots *as a shotgun does.* Or, to say the least, *that is what appellant had the*

right reasonably *to assume the trial Court meant by this ruling.* The trial Court may have had in mind a different meaning, a broader meaning. If so, that different and broader meaning was not stated. Appellant, of course, was not bound by the undisclosed thoughts and intentions of the trial Court, he was not required to read the mind of the judge of that Court under sanction that if he failed to read it fully and correctly he would become liable to imprisonment for criminal contempt.

Note that nothing said by appellant was inflammatory or a vile epithet. The epithet hurled in this instance was hurled by Mr. McMillan and consisted of the shotgun reference.

FOURTH INCIDENT.

The fourth incident is recited by this Court as follows:

> "Immediately thereafter, *in disregard of the ruling,* appellant continued with the discussion of the Maritime Federation of the Pacific, and its alleged control by Harry Lundeberg, who appellant stated would be a government witness, and to whom he referred in derogatory language. Objection was made and the Court said: 'What Mr. Hallinan has to say is in reality that type of matter that may be reserved for closing argument, if the facts demonstrate it. * * * I think, Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.' "

The record account of this incident beginning on page 555 and ending on page 557 reads as follows:

"Mr. Hallinan. Now, an organization of sailors on the Pacific Coast, a member of the Maritime Federation of the Pacific, was controlled by a man who will appear before you. His name is Harry Lundeberg, one of the most remarkable of the witnesses that will be produced. He is like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas—a man who has been arrested for brawling and assaults in half the courts of the world. Dominating this union with an iron hand, he burned the ballots that were taken——

Mr. McMillan. If your Honor please——

Mr. Hallinan. ——by his union concerning the Federation——

Mr. McMillan. Just one moment.

Mr. Hallinan. Pardon me. You want to talk?

Mr. McMillan. I want to make an objection, Mr. Hallinan. You as a lawyer, with your wide experience, know that you have no such statements to prove in this court.

The Court. This—I again repeat another admonition to the jury, that what Mr. Hallinan has to say is in reality that type of matter that *may* be reserved for closing argument, if the facts demonstrate it. *This wild anticipation of the Government's case is* to my mind novel; *I have never experienced it before in these courts, and I am naturally indulgent toward counsel on both sides,* to the end that this case be heard fairly, impartially and that we have all the evidence before us. But *I think, Mr. Hallinan,* that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others *has no place at the present time.*

Mr. Hallinan. Very well.

Mr. McMillan. May I interrupt, just to give a good example? He has stated Mr. Lundeberg has been arrested in every port——

The Court. I noticed that. I noticed that. All parts of the world. And I will instruct the jury to disregard *that* statement.

Mr. McMillan. Well, the point that I had——

The Court. I was hopeful that we might get into the evidentiary matter, have the case under way. I am not going to foreclose Government counsel or defense counsel from the widest argument at the close of this case. I am not going to foreclose them on time.

Mr. McMillan. Yes.

The Court. I never have. I assure you, Mr. Hallinan, that I will give you ample time, as well as your colleague, Mr. MacInnis, to argue the matter from its fullest picture. But at the present time I say again to you, with the mild degree of patience that I command, that you are going far afield from any opening statement that I have ever heard in this court or any other court.

Mr. McMillan. Your Honor, what I wished to point out definitely is this: Those statements with reference to arrest; now, Mr. Hallinan is a skilled lawyer, and knows that if that witness takes the stand and he seeks to impeach that witness, the only question that he could ask him is, 'Have you ever been convicted of a felony?'

The Court. I understand.

Mr. Hallinan. I don't intend to prove it by that witness; I will prove it by one of your own witnesses. One of his own, his other witnesses."

Appendix page 28

We observe that this Court says:

> "Immediately thereafter, in disregard of the ruling, appellant continued with the discussion of the Maritime Federation of the Pacific *.* *" etc.

Actually, what appellant did was to begin at once to *comply* with the trial Court's ruling *as appellant understood it*, that is *by becoming specific*, by singling out for comment one of the persons whom he expected to be called as a prosecution witness.

Lundeberg had not only testified against the defendant Bridges in the second deportation proceeding (testifying that Bridges admitted to him that he, Bridges, was a member of the Communist Party) but Lundeberg was the only one of 125 witnesses who had testified against Bridges in one or the other of the two deportation proceedings who had not been thoroughly discredited and their testimony completely rejected by the reviewing officers of the government. [See *Bridges v. Wixon*, 326 U.S. 135, and also the printed record of this Court in the case of *Bridges v. Wixon* before it went to the Supreme Court of the United States.] Appellant, therefore, had every reason to expect that Lundeberg would be called as a prosecution witness in the case then on trial.

Again we say that appellant was trying to *comply* with the trial Court's ruling by leaving the general and getting to the particular. He did not intend to disregard the previous rulings of the trial Court and he did not *in fact* disregard that ruling, as stated by this Court.

Neither the objection nor the ruling in this incident was directed against the mention of labor union disputes. Both the objection and the ruling were directed to what the trial Court called "these excoriations and vituperative matter" and the extent of the Court's ruling was to say that the trial Court **thought** that such matters had "no place at *the present time*". Again, an *expression of opinion* not amounting to an order.

Note that what appellant said in this instance was to use this Court's words "derogatory language". It was not inflammatory and it did not descend to the level of vile epithets. as will be shown in the all italics paragraph at the end of the 9th incident.

FIFTH INCIDENT.

The fifth incident is recited by this Court as follows:

> "The certificate recites that only a few seconds or minutes later, appellant again 'launched into the *same* demeanor, same conduct, persistent, studied as it was.' From the record we learn that when appellant resumed his opening statement, his very first sentence had to do with quarrels between Bridges' union and the A.F.L. He went on to charge that Lundeberg and another labor leader were joined in their fight against Bridges and the latter's union by employer groups, goon squads, killers and perjurers. After the statement that certain government officials also joined in this persecution of Bridges, although other 'upstanding, granite-honest' government officials had gone out of their way to protect him, another objection was interposed and sustained."

Appendix page 30

First, let us comment on the assertion which this Court quotes from the certificate, viz.:

> "launched into the same demeanor, same conduct, persistent and studied as it was"

What was the "same demeanor"? Search the certificate from one end to the other and there will not be found any description, any word picture, concerning appellant's demeanor. And search the entire record and there will not be found *any* reference to *any* demeanor of appellant as being improper, boisterous, surly or otherwise unbecoming. Here the trial Court by the word *"same"* is charging by implication, by innuendo, **BY SUGGESTION** that which, *if so,* should have been charged in *direct and unmistakable terms.* And here we find this Court being misled by that suggestion and itself repeating it, *although it finds no substantiation in the record.*

The record shows that appellant resumed his statement about the two-thirds mark on page 557 of the transcript and that he continued talking *without interruption by either Court or counsel* to about the same position on page 560: a matter of three transcript pages and about four minutes of time. It is true that during that period appellant made mention of labor union disputes, but the pertinent things to observe are first, that no objection was made either by government counsel or the Court to what appellant said on that subject and, second, that the next objection, when it came, was directed against a statement by appellant which had *nothing whatever* to do

with the subject of labor union disputes. As is indicated in this Court's opinion, the next objection was to the following statement by appellant appearing on page 560 of the transcript:

> "But let me say this right now for the jury, that any mention that is made of the activity of the Government officials in that connection does not mean the United States Government as a whole, or does not mean the majority of the officials or any officials other than the ones designated, because at every juncture of his career, when his safety and his happiness were threatened, some fine, upstanding, granite-honest *American official,—and usually in a high place*—leaned down and lifted Harry Bridges and delivered him from the coils——"

The objection and the ruling were as follows:

> "Mr. McMillan. If your Honor please, that is also part of a closing argument. It is purely argumentative.
>
> The Court. Yes, objection sustained." (Tr. pp. 560-561.)

There is nothing either in this objection or in this ruling which either directly or indirectly relates to the subject of labor union disputes.

In this instance there was no inflammatory matter and no vile epithets as we will show in the all italics paragraph at the end of the 10th incident.

SIXTH INCIDENT.

The sixth incident is recited by this Court as follows:

> "Immediately thereafter appellant said, 'the strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges' arrest on a deportation inquiry to be issued by the Secretary of Labor.' Appellant also referred to the passage of a 'bill of attainder' against Mr. Bridges by the United States House of Representatives * * *".

The record pertaining to this incident (Tr. p. 561) is as follows:

> "Mr. Hallinan. The strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges' arrest on a deportation inquiry to be issued by the Secretary of Labor. The result of that deportation inquiry I am not going to go into, but the fact that one existed is of the utmost importance, and is one of the things that the jury will have to take into consideration in analyzing what the witnesses are saying. And I will presently explain to you why.
>
> The United States House of Representatives passed as against Harry Bridges the only bill of attainder ever passed in the United States, and——
>
> Mr. McMillan. Your Honor, if your Honor, please, that is argumentative. He is not in some conference now.
>
> The Court. Objection sustained."

It is self-evident that such a statement by appellant made no reference to the subject of labor union disputes and that neither the objection nor the ruling had any relation to that subject.

Note that there was no inflammatory matter and no vile epithets in this instance.

SEVENTH INCIDENT.

The seventh incident is recited by this Court (as a continuation of the sentence in which the reference to the sixth incident is ended) as follows:

> "* * * and also stated that 'Mr. Bridges has made the mistake of not taking the $50,000 that was offered to him back in 1934 to throw the strike and go back to Australia.' Again objection was made and again sustained * * *"

The record discloses that this seventh incident occurred on pages 577 and 578 of the transcript (i.e., some 16 transcript pages and approximately twenty minutes in time subsequent to the sixth incident).

The record account of this seventh incident is as follows:

> "The Court. You may proceed.
>
> Mr. Hallinan. However, Mr. Bridges has made the mistake of not taking the $50,000 that was offered to him back in 1934 to throw the strike and go on back to Australia——
>
> Mr. McMillan. That is objected to.
>
> Mr. Hallinan. We will show that.
>
> The Court. The objection is sustained and the jury is instructed to disregard the statement."

We suppose that the unstated ground of this objection was that the matter stated by appellant was irrelevant and immaterial. The statement did not deal with a union labor dispute as such but with the defendant Bridges' asserted act of refusing an offer of $50,000 to throw a strike. The ruling was not directed against the mention of union labor disputes.

Again no inflammatory matter and no vile epithets.

EIGHTH INCIDENT.

The eighth and last incident mentioned by this Court under the heading of labor union disputes is stated by this Court as follows:

> "* * * and appellant then referred to the labor situation in Hawaii as 'the renewal of about what had happened in San Francisco—poison gas and clubs for the workers * * *'. Again objection was made and again sustained."

The record printing of this eighth incident (Tr. pp. 579-580) is as follows:

> "The Court. Proceed.
>
> Mr. Hallinan. The International Longshore Workers Union went down to Hawaii and organized the disorganized and exploited workers there, and they drew down upon themselves and upon Bridges anew the malice, hatred and revenge that has flowered this conspiracy anew of the powerful feudal five companies of the New Hawaii, and that is the immediate cause of what is now confronting us. The situation there was the renewal of about what had happened in San Francisco—

poison gas and clubs for the workers and a storing up of the——

Mr. McMillan. If it please Your Honor,——

Mr. Hallinan. This is not ancient history; this happened within the last year.

Mr. McMillan. The poison gas, rocks, stones——

The Court. The objection is sustained, Mr. McMillan."

This statement by appellant did relate to a labor union dispute. It was not in disregard or in defiance of any previous ruling of the trial Court, however. The only previous ruling of the trial Court relating to the mention of union labor disputes was, as we have pointed out, the ruling in the third incident and it related, again as we have pointed out, to *general rather than specific* (i.e., shotgun) historical *accounts of union labor disputes.*

Note that here there was no inflammatory matter and no vile epithets. That there had been violence in the recent Hawaiian strike was well known.

B. ATTACKS ON CREDIBILITY AND CHARACTER OF OPPOSING WITNESSES.

The Court commences its discussion of this subject with the following statement:

"The next type of matter found in the opening statement consists of direct attacks upon the credibility and character of anticipated opposing witnesses. The Court, in the absence of the jury, stated that *in its opinion* appellant had, in his

opening statement, been 'anticipating much of the Government's case, indulging in speculation on speculation,' and 'creating an atmospheric quantity at this stage designed to prejudice and inflame the jury.' *Reference is made to Government counsel's statement as to the position of the Government. This, the record discloses, was to the effect that appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement.*"

We find in this statement something which to us is strange. Strange to the point of being literally dreadful in its implications. We believe that once we have pointed this thing out, this Court, out of consideration for itself as well as for the law, will want to give this case further consideration before going on permanent record.

What is the strange thing of dreadful implications which we find in the foregoing statement of this Court? We find the trial Court making reference to the "position" taken by government counsel *as a predicate for a summary judgment holding appellant in criminal contempt of Court* and we find this Court making reference to that "position" of the prosecutor *as a predicate for affirming that summary judgment of criminal contempt.*

From what we have read upon the subject we suppose that in a totalitarian country, where no dissent is permitted and the prosecutor speaks with the voice of supreme authority, a defense counsel who did not accede to and follow a "position" taken by the prose-

cutor would be summarily imprisoned for criminal contempt. But we had no idea that any trial Court in our land would consider such an action contempt of Court, much less criminal contempt of Court, or that any Appellate Court in our land would base an affirmance in a summary judgment of criminal contempt, either in whole or in **ANY** part, upon the charge that defense counsel in a criminal case had failed to follow a "position" taken by the prosecuting attorney **concerning how the case of the defendant should be presented.**

Is the former not precisely what the trial Court has done in this case? And is the latter not precisely what this Court is **doing** in this case? What relevance or materiality **could** the reference to the "position" taken by the prosecutor have, either in the trial Court's certificate or in this Court's opinion, *except to serve as a* **predicate** *for the judgment?*

It should be observed that neither in the certificate of the trial Court nor in the statement of this Court is it said that the "position" so taken by the prosecutor was adopted by the trial Court, that is converted by the trial Court into a ruling. The record discloses that the trial Court did not, either directly or by implication, adopt the "position" so taken by the prosecutor. Indeed, in the *first* statement made by the trial Court *after* the prosecutor had stated his "position" (the position being stated by the prosecutor on page 530 of the transcript and the following statement by the Court being made on pages 530 and 531 of the transcript) the trial Court said, addressing appellant:

"I of course am at a loss presently to indicate to you how we may delimit your presentation at this time".*

In other words, one of the acts of contempt *certified* by the trial Court and *accepted* by this Court ***upon which the judgment is made to rest*** is an act of appellant in not acquiescing in and following a "position" *taken by the prosecutor* **which was not made a ruling of the trial Court.**

We find in the foregoing statement of this Court another thing which to us has dreadful implications.

The trial Court would not have made reference to the "position" taken by the prosecutor nor would this Court have stated the "position" taken by the prosecutor had not the trial Court and this Court severally been of the view that such "position" was legally sound. That "position" was not and is not legally sound. *It runs counter to the fundamental principles of our American system of justice.* And that this is so is subject to demonstration.

Every prosecuting attorney, at the commencement of a criminal trial, makes an opening statement. In making that opening statement he says things ***which attack the credibility and character*** of the defendant, or of the defendants, as the case may be. *This is necessarily so.* **He could not make an opening statement without so doing.**

*The trial Court, in the certificate, made reference to but did not quote this statement. Compare Transcript pages 531 and 778. This Court makes no reference to this statement.

In this case the prosecuting attorney in his opening statement told the jury that he would prove that the defendant Bridges was a member of the Communist Party, that he had committed perjury, that he had defrauded the government and that he had conspired with the other two defendants and with "divers persons to the Grand Jury unknown" to commit perjury and to defraud the government. The prosecuting attorney also told the jury in that opening statement that he would prove that each of the other two defendants was a member of the Communist Party, had conspired with the defendant Bridges to commit perjury and to defraud the government and had aided and abetted the defendant Bridges in committing perjury and in defrauding the government. In so doing the prosecuting attorney *attacked the credibility and character of each of the three defendants* and, by the expression "divers persons to the Grand Jury unknown," *of* **every** *person* the defendants **possibly** could call to controvert *directly* (as distinguished from circumstantially) the witnesses whom the prosecution would call to establish the offenses charged against the three defendants.

We do not complain of this. That was the prosecuting attorney's legal right.

But the law of our land gives to the prosecutor no greater breadth or depth or scope in the making of an opening statement *than it gives to the defense.* Our system of justice **leans** in such matters not in favor of the prosecution *but in favor of the defense.* It

does so in the presumption of innocence, in the doctrine of reasonable doubt, in the allowance of more peremptory challenges to the defense than to the prosecution and in the right of appeal to the defendant on conviction but not to the prosecution on acquittal. It does so in many other ways. In not *one single way* does it give to the prosecution a greater leeway.

Yet is the opposite of this not precisely what the prosecutor contended by taking the "position" that "appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement"? *And is the opposite of this not precisely what the trial Court by necessary implication held when it made reference to that "position" of the prosecutor as a predicate for judging appellant guilty of criminal contempt?* **And is the opposite of this not precisely what this Court by necessary implication holds when it states that "position" of the prosecutor and uses it as predicate for upholding appellant's conviction?**

We will say in all sincerity that by reason of the statement of this Court which we have just discussed, if the present opinion of this Court is allowed to become the decision of this Court and if the Supreme Court of the United States by reason of the haste which it must exercise in passing on petitions for certiorari refuse to grant certiorari a *dangerous,* **repressive** and **UNAMERICAN** precedent will have been set which, if followed, *will lead to the destruction of our cherished system and concept of justice.*

Appendix page 41

Concluding our comment on the above statement of this Court, we again call attention to the fact that there was no ruling of the trial Court foreclosing appellant upon resuming the opening statement from attacking the credibility and character of anticipated opposing witnesses. There was only the "position" taken by the prosecutor to serve as a predicate for a finding of contempt, should appellant make such an attack.

NINTH INCIDENT.

We now proceed to the first incident under this heading mentioned by this Court. We will call it the "Ninth Incident" for the purpose of easy reference and to avoid confusion. It is stated by this Court as follows:

> "Appellant then resumed his opening statement. We learn from the record and certificate that appellant referred to Harry Lundeberg as 'one of the most remarkable of the witnesses that will be produced,' 'like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas, a man who has been arrested for brawling and assaults in half the courts of the world.' Objection was again made and the Court stated: 'This wild anticipation of the Government's case is to my mind novel,' and ruled that 'these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.' The Court also specifically instructed the jury to disregard the statements about Lundeberg's arrests in all parts of the world."

Appendix page 42

We have hereinbefore quoted the record concerning this incident under the Fourth Incident, supra, pages 23-24.

In this incident did the trial Court make a ruling foreclosing appellant from making further attacks upon the credibility and character of anticipated opposing witnesses? It did not. It did what in other instances this Court has called "expressed * * * opinion". That this is so, is revealed by the following excerpt from the trial Court's statement, giving particular attention to the words printed in italics:

> "The Court. This—I again repeat another admonition to the jury, that what Mr. Hallinan has to say is in reality that type of matter, that *may* be reserved for closing argument, if the facts demonstrate it. This wild anticipation of the Government's case is *to my mind* novel; I have never experienced it before in these courts, and *I am naturally indulgent toward counsel on both Sides* to the end that this case be heard fairly, impartially and that we have all the evidence before us. But *I think,* Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time."

It should be observed further that the only portion of appellant's statement which the trial Court instructed the jury to disregard was that part about Lundeberg's having been arrested in various parts of the world. The following excerpt from the record will reveal that this is so:

"Mr. McMillan. May I interrupt, just to give a good example? He has stated Mr. Lundeberg has been arrested in every port——

The Court. I noticed that. I noticed that. All parts of the world. And I will instruct the jury to disregard the statement."

In this incident nothing inflammatory, nothing calculated or likely to rise the passions of the jury, was said by appellant. What appellant said about Lundeberg was, as this Court said in its comment under the fourth incident, "derogatory". But referring to Lundeberg as like a character from Jack London fell far short of being a "vile epithet". The reference to his having a reputation for violence and ferocity as wide as the seven seas and of having been arrested for brawling and assaults in half the ports of the world was, **obviously,** *a hyperbole, was* **obviously,** *a poetic or rhetorical overstatement; like the statement "I am so hungry I could eat a horse, hides, hoof and all". But the general characterization which appellant gave of Lundeberg was capable of being proved, capable of being seen by the jury to be true not only as the result of the testimony of other witnesses but through examination and cross-examination and the demeanor on the witness stand of Lundeberg, himself.*

TENTH INCIDENT.

The next incident is stated by this Court as follows:

"Only a few seconds later, appellant 'launched into the the same demeanor, same conduct, persistent, studied as it was'. The subsequent state-

ments included assertions that the defense would prove that Lundeberg and another labor leader employed a known murderer to kill Bridges and did in fact send a man to New Orleans who killed a C.I.O. organizer there. Appellant also asserted that the labor leaders had under their control goon squads, killers and perjurers."

Court is referring to the middle portion of the statement by appellant commencing at about the two-thirds mark on page 557 and ending at about the two-thirds mark on page 560 of the transcript which we discussed under the Fifth Incident. As we pointed out in that discussion, the matters to which this Court now refers were not objected to either by Government counsel or by the trial Court. Such remarks, therefore, could have constituted contempt only had there been a previous order by the trial Court foreclosing appellant from making statements of this kind. As we have shown, the trial Court had not previously made any such order. And this incident could serve as the predicate for subsequent contempt only if this incident contained such an order. It does not. It does not contain even so much as an "expressed opinion" by the trial Court.

The statement of appellant here quoted by this Court is factually true. That some labor leaders do have "goon squads" under their control is a matter of common knowledge. That at times murder and attempted murder is resorted to in inter-union conflicts is exemplified by the assaults which have been made upon the Reuther brothers. That there is a gangster

element within the ranks of organized labor which resorts to violence, blackmail, extortion and perjury is exemplified in the publicly revealed history of Browne and Bioff in the moving picture industry. Here appellant was not hurling vile epithets, he was stating facts which he was prepared to prove, in part circumstantially and in part by direct evidence. It so happened that defendant Robertson was a victim of one of the "goon squads" mentioned, that he was beaten up and his back nearly broken in New Orleans, and that another CIO organizer was killed by such a "goon squad" in New Orleans.

ELEVENTH INCIDENT.

The next incident is stated by this Court as follows:

> "Appellant further stated: 'Now, as early as 1936 there had been introduced into Harry Bridges' union and into his personal office as his private secretary a woman employed by the Waterfront Employers Association, and she was also the mistress of Mr. Harry Lundeberg.' Objection was made and appellant gave as justification for the statement his purpose of showing Bridges' consciousness of being watched by agents of his enemies, who would use against him any detected activities in the Communist Party. The Court then said, among other things, that an opening statement was not a sounding board for giving vent to immaterial matters, and that it was very unfair to make such a reference to the woman."

This statement is accurate except in one particular. The trial Court did not say "That it was very unfair

to make such a reference to the woman". What the trial Court did say in this respect was, "I *think* it rather an extreme situation that reference be made to this woman at this juncture without evidence before the Court or jury". (Transcript page 567.) Moreover, the trial Court did not sustain the prosecutor's objection or admonish the jury to disregard appellant's statement.

The only objectionable matter here is the reference to the unnamed woman having been a *mistress* of Lundeberg. That statement may have been in bad taste. But as far as being inflammatory is concerned *it was much more likely to have incensed the jury against appellant and his client* than to have aroused the passions of the jury against the prosecution or the prosecution's case. The word *"mistress"* was not used for the purpose of moral censure but to name *a relationship*. It had a direct bearing upon the credibility of several prospective prosecution witnesses. Moreover, at the trial it developed that that woman was discharged by Bridges. He testified that it was because it was discovered that she was spying against the union, revealing to the enemies of the union and adversaries of the union confidential union affairs. The prosecution contended, through several witnesses, that she was discharged as a matter of Communist Party discipline. The word "mistress" was not used as an epithet *but to name a relationship*.

TWELFTH INCIDENT.

The next incident is stated by this Court as follows:

"After some discussion, the Court stated to appellant: 'You characterized all of these witnesses as perjurers, low people, characterized them with vile, vituperative terms. 125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now *I think* it highly unfair to this court, indulgent as I have been with you, to continue on that line or that particular vein.'"

The record concerning this incident is as follows:

"Mr. Hallinan (addressing the Court), * * * Now, they said that they would show that in conformity with Communist Party plans of keeping secret the membership of persons prominently identified, that membership cards issued to the defendant were issued in the name of Harry Bridges, that he was some kind of a secret, hidden conspiratorial sort of member; that he was elected under some sort of secret and guilty idea. Now, they can come out and say that in an opening statement and try to blacken these gentlemen before anything starts. But because we mention some woman, without revealing her name at all, but who we suppose and expect is going to be a witness here, and who, if we haven't——

The Court. No. Now, Mr. Hallinan,——

Mr. Hallinan. We will produce the evidence on it.

The Court. Mr. Hallinan, let us pause momentarily and analyze just what we say. You characterized wholesale all of these witnesses as per-

jurers, low people, characterized them with vile, vituperative terms. 125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now, *I think* it highly unfair to this Court, indulgent as I have been with you, to continue on that line or that particular vein." (Transcript pp. 568, 569.)

The trial Court's reference to 125 persons related not to something which had just been said by appellant. The most recent mention of this 125 had been made not by appellant, but by the Court, on the preceding day, and more particularly, on page 533 of the transcript. Consequently, this is not an incident (of contempt) at all, but only a statement by the trial Court, and that statement was not an order; *it was the expression of an opinion,* as the words "I think" reveal:

Here there were no statements by appellant against anyone. Nor was there anything inflammatory said.

THIRTEENTH INCIDENT.

The next incident is stated by this Court as follows:

"The certificate quotes a subsequent statement by the Court, 'again responding to an objection urged by Mr. McMillan, and to matters that were incompetent and irrelevant'. It is shown by the record that these matters were specific references to three named individuals who appellant asserted were ex-Communists and would be Government witnesses. Each of the references also included derogatory remarks. The Court then remarked:

'What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this court of the general characterizations and vituperations.' The record shows that this remark of the Court was made the basis of a ruling. Appellant replied: 'All right, and that is just what I say, your Honor.' The Court answered: 'That procedure * * * has never been the procedure in the federal courts. I sustain the objection.' "

The record concerning this incident (Transcript pages 473 and 474) is as follows:

"Mr. Hallinan. Then let us get to the next category and root of their false and fraudulent charge, and I hope that these gentlemen are not entitled to the instant protection that Mr. McMillan affords the government agents. They will produce here, they tell us, ex-members of the Communist Party who will testify to certain things. And there are such witnesses. The most fantastic of all that will be produced, to name a few of them, they have Benjamin Kiplau, who occupied most of his life as a labor spy. There was Manning Johnson, a negro, who was raised by the Communist Party from a cafeteria busboy to some sort of organizer and is now qualified as a government witness. There is Louis Budenz who deserted a somewhat impecunious position on a Communist newspaper and returned or went into the Roman Catholic Church and is now——

Mr. McMillan. Just a moment.

Mr. Hallinan. We are entitled to talk about these people, Your Honor.

Mr. McMillan. There was nothing said in our opening statement as to who the witnesses will be.

Mr. Hallinan. I know who they are. They produced some of these people before the Grand Jury. We are entitled to discuss them and warn the jury what is coming, to inform them, to have them look at them with inquisitive eyes. We do not have to keep quiet about every witness that they are going to put on. If we had such a witness that they knew of, they could characterize him, tell about his testimony, why he would be biased or motivated. That goes right to the credibility of the witness. We can test all of that on cross-examination. I think if anything is proper on an opening statement, that is. All they want to do, Judge, is sort of write out an opening statement for the defense and say 'You can say this and no further.'

The Court. What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this Court of the general characterizations and vituperations.

Mr. Hallinan. All right, and that is just what I say, Your Honor.

The Court. That procedure may be extant or it may be the procedure in some other courts. It has never been the procedure in the federal courts. I sustain the objection.

Mr. Hallinan. I will have to enter an exception."

It will be observed that the objection "there is nothing said in the opening statement who the

witnesses would be". In other words the objection was to the naming of particular persons and prospective witnesses. (Of the three named, Manning Johnson became a witness at the trial, and Louis Budenz was a witness before the Grand Jury.) The trial Court's ruling was limited to that objection, for what the trial Court said was "I sustain *the* objection".

There was nothing inflammatory in the above statement of appellant and there were no vile epithets hurled. Gitlow had been a labor spy. Manning Johnson was a negro, had been a bus-boy, had become an organizer of the Communist Party and at the time of trial was a government witness. Louis Budenz had left the Communist Party and joined or rejoined the Roman Catholic Church. Is this Court of the opinion that the charge that Budenz had left or deserted the Communist Party and became a member of the Roman Catholic Church is a vile epithet?

FOURTEENTH INCIDENT.

The next and last incident discussed by this Court under the category of attacks upon the prospective witnesses, is stated by this Court as follows:

> "Later in the certificate reference is made to another objection. The record discloses the objectionable statements to have constituted a wholesale attack on 125 persons who appellant asserted would testify for the Government. Appellant accused them of traveling 'any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers

there, willing to say anything that would bring them a few dollars * * * for fame or what they call fame * * *. They are perjurers of the worst kind * * * spies, turncoats, the very swill of humanity * * *"

The record concerning this incident (Transcript pages 580 to 582) states:

"Mr. Hallinan. The agents of those organizations stirred up anew the conspiracy, revived it, revitalized it, and now, four years after Harry Bridges swore under oath in the Superior Court that he was not and never had been a member of the Communist Party, a perjury charge comes on for trial before you ladies and gentlemen, and we will show by the witnesses for the prosecution that the express and avowed reason for the institution of that was to break the strike in Hawaii, and so said Tom Clark publicly, the Attorney General of the United States, and we will show you that that was the exact and only purpose of fomenting this persecution.

My opening statement has been criticized by admirable judges. The trial procedure may invoke criticism by jurors and even spectators. The sources of inquiry here cover a period of many years. Whether it sounds fantastic or not, there were 125 witnesses. The preparation for the proper trial of such case would consume months. The testimony of all people in previous matters must be read over. I assume, Your Honor, that I should not mention any decision of any court no matter how relevant I consider it to be. I am not going to transgress on your patience.

The Court. We have already discussed those matters at length, Mr. Hallinan.

Mr. Hallinan. These 125 people have testified under oath in numerous matters. The so-called ex-members of the Communist Party have run from New York to Hawaii to San Francisco to Louisiana—any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers there, willing to say anything that would bring them a few dollars typical of the kind of people that come up in circumstances and periods such as we are going through, now ready for a few dollars, for fame or what they call fame, to keep themselves in the limelight, to swear any man's life away for a hundred dollars. They are perjurers of the worst kind—one of them who will come and hear the very tightest oaths of the Communist Party the very soul of this sort of thing, hired informers, spies, turncoats, the very swill of humanity, these ex-Communists, experts who have now turned upon their old comrades and associations, and finding the pickings more profitable in the safe environment of the government's protectorate, will come in here and swear any man's life away whether they ever saw him before or not."

There was no objection and/or ruling in or to this incident.

The only thing resembling an epithet here is the expression "the very swill of humanity". Standing alone, without the direct statements which precede it, it would be an epithet, but following these direct statements it is not so much of an epithet as it was a summing up in a general term the direct statements

which precede it. Is not the bearing of false witness for hire one of the lowest and dirtiest things a human being can do? Is not perfidy, the betrayal of one's friends for hire a low and dirty thing? At the trial of this case one such witness for the prosecution, on being cornered on cross-examination, openly confessed that on direct examination he had lied concerning the land of his birth, his name, his family, the places where he had lived, the schools which he had attended and his occupation at various times. Another such witness admitted having committed perjury on two separate occasions and each time with respect to a number of different facts and was trapped in the commission of perjury while on the witness stand. Two other such witnesses, including Manning Johnson, testified that Bridges was in New York City taking a bow before a Communist convention and being elected to and inducted in high office in the Communist Party at a time that it was conclusively proven that Bridges was in Stockton, California, addressing a union meeting and attending a night club. Another government witness admitted that he might have committed perjury on a previous occasion. All of these witnesses were admittedly former labor leaders and former members of the Communist Party. One of them admitted that he had received $5,000.00 from the government in a period of ten months for acting as an expert. Others testified to receiving lesser amounts as expert witness fees. Appellant was not exaggerating when, in this fourteenth incident, he described the character of the witnesses whom the prosecution would call.

(all italics)

C. ESPIONAGE AND WIRE-TAPPING BY AGENTS OF THE GOVERNMENT.

The next two paragraphs of this Court's opinion read as follows:

> "Another subject of rulings and statements was the asserted wire-tapping and 'espionage' activities of Government agents against Bridges. Appellant stated that in Seattle in 1937, 'agents of the Immigration Department dictographed his (Bridges') hotel room and tapped his telephone wire.' The Court interrupted and the prosecutor, upon inquiry from the Court, renewed his assurance that no illegally obtained evidence would be introduced. The Court then ruled as follows: 'The objection is sustained, the jury is admonished to disregard the statement of any kind, character or description, bearing upon that matter.'
>
> "Appellant made a subsequent reference to espionage activities of the F.B.I. against Bridges. Objection was again made and again sustained. Almost immediately after the sustaining of the objection appellant referred to 'the boyish workings of the F.B.I.' and stated that the defense would prove that scores of F.B.I. agents had for years been following Bridges, interviewing and threatening his friends and associates, trying to build up a case."

We have no quarrel with what this Court *actually says* in these two paragraphs. Our objection is to the unwarranted and unmistakable implication given by bringing these two paragraphs together in such a way as to indicate that they relate to the same subject

matter, that is, that the ruling mentioned in the first of these two paragraphs foreclosed appellant from making the statements attributed to him in the second of these two paragraphs.

The record pertaining to the matter mentioned in the first of these two paragraphs (Tr. pp. 565-566) is as follows:

> "The Court. * * * There is no question involved in this case of wire-tapping. I take it from assurances given to me on the motion to dismiss, there will be no effort made on the part of the Government to introduce any evidence as a result of any unlawful enterprise?
>
> Mr. Donohue. I renew that assurance.
>
> The Court. You renew that assurance?
>
> Mr. Donohue. Yes, your Honor.
>
> The Court. The objection is sustained, the jury is admonished to disregard the statement, of any kind, character or description, bearing upon that matter."

It should be observed that this ruling related to the matter of wire-tapping and (other) illegal activities on the part of government agents.

The record pertaining to the matter mentioned in the second of these two paragraphs (Tr. pp. 571-573) is as follows:

> "Mr. Hallinan. The motives of the witnesses who will testify, whether they are Communists, ex-Communists, rival union leaders or government agents, are equally open to inquiry by the jury. Bridges was possessed of a faculty that may do him more harm in these matters than all

his serious philosophy. In the year 1941 a convention was held in New York City and the espionage activities of the Federal Bureau of Investigation witnesses reached ridiculous proportions, that is to say, there were four or five men constantly following him. If he went into a hotel lobby, a young man would be looking through a hole cut in newspaper.

Mr. McMillan. I object to that.

The Court. Sustained."

* * * * * * *

"Mr. Hallinan. This is all proper, your Honor, I submit. Can't we show the activities and motives of the witnesses who are agents of the government? Are they exempt?

The Court. I do not know that they are being produced. The matter at this stage of the proceedings is irrelevant and immaterial, and I sustain the objection, Mr. Hallinan.

Mr. McMillan. We do not even know that he is going to bring in that newspaper.

Mr. Hallinan. Ridicule is a very dangerous instrument. People's pride is a sensitive part of their organization. Harry Bridges gave two articles, one to a New York newspaper and the other to a magazine, the New Yorker, which in 1941 described all the boyish workings of the FBI in this case, and excited thereby additional hatred for him in the ranks of an organization that, of course, takes itself seriously.

Mr. McMillan. If Your Honor please, we are obliged to object again. The newspaper articles that he speaks of would be self-serving as legal proposition.

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Mr. Hallinan. Your Honor, it all goes to show the knowledge of the espionage and furthermore, the giving of an amusing article——

The Court. Is it your present theory that the FBI were part and parcel of this conspiracy?

Mr. Hallinan. I will say so. We will show that scores of them have for years been following this man interviewing his clients, his friends, berating witnesses, threatening them, doing all sorts of things, trying to build up a case.

The Court. You reserve your comment concerning them until you finish your cross-examination and argue the matter to the jury. At this time it is irrelevant and immaterial."

It should be observed that in the statements of appellant just quoted that not one mention is made of wire-tapping or of other illegal activity on the part of anyone. The statement related to espionage and more particularly those forms of espionage known as surveillance and the questioning of persons.

Observe further that in the second of the two quotations from the record the *objection sustained* was to appellant's remark concerning what the F.B.I. had done; that the next statement of appellant related to two articles by the defendant Bridges ridiculing the F.B.I., [a quite different subject because it related to the probable animus of the F.B.I. toward Bridges because of those articles] and that the third comment of appellant *which this Court mentions in such a way as to imply that it was an act of contempt was made by appellant in* direct response *to the trial Court's*

question: "Is it your present theory that the F.B.I. were part and parcel of this conspiracy?"

In other words, in this last instance, *this Court is holding that appellant was guilty of criminal contempt* **for answering a question asked him by the trial Court,** *the answer, itself, being confined to the subject stated in the trial Court's question.*

Is this not "lifting by the bootstraps", i.e., *a straining to find contumacious conduct* where none in fact exists?

It should be observed that nothing said by appellant in relation to espionage and wire-tapping by agents of the government was in the nature of a vile epithet or of an epithet at all. And that nothing said by him in that connection was in the least bit inflammatory.

D. THE TWO INCIDENTS MENTIONED AT THE BOTTOM OF PAGE 6 OF THE OPINION.

FIFTEENTH INCIDENT.

This Court continues as follows:

> "Two incidents occurred during arguments addressed to the trial Court which it deemed contumacious. Appellant referred to the fact that he had only three weeks to prepare. The Court asked him if he did not have the assistance of associate counsel. Appellant replied: 'Yes—who made the motions that your Honor treated with contempt.'"

The comment of appellant which this Court quotes appears on page 532 of the transcript. On page 520

of the transcript the trial Court characterized the motions made by previous counsel in language indicating that he thought them contemptible or ridiculous. We have reference to the following statement by the trial Court:

> "The gentlemen preceding you argued entrapment, that the Government entrapped Mr. Bridges into this alleged false swearing—upon what theory entrapment rested I do not know. It was a novel thing for me to hear".

But this is not our main answer to this assignment. The record clearly discloses that the only part of appellant's statement which the trial Court heard was the word "yes" and that the trial Court did not hear appellant say "who made the motions that your Honor treated with contempt". Our authority for this statement appears on page 778 of the transcript. In making the oral assignment of contempt, the trial Court on that page said:

> "At page 532, again counsel, Court—Court, counsel comments. Mr. Hallinan referred to the fact that he had only three weeks to prepare.
>
> The Court. You have the benefit, of course, of an associate counsel—the old firm no doubt are helping a little bit?
>
> Mr. Hallinan. Yes——
>
> (this was in an undertone, a sort of an aside or stage whisper, but the reporter captured it.)
>
> Mr. Hallinan. Yes—who made the motions that Your Honor treated with contempt."

Had appellant's remark been made in a voice volume loud enough for the trial Court to have heard it,

there would have been no occasion for the trial Court to have commented upon the fact that the "reporter captured" such statement. In other words, *it affirmatively appears from what the trial Court, itself, said that such comment by appellant was* **not made in the hearing of the Court** *and therefore did not constitute contempt punishable under Rule 42(a).*

Here there is not even the charge that what appellant said was inflammatory or that it constituted a vile epithet.

SIXTEENTH INCIDENT.

This Court continues:

> "Appellant referred to headlines in newspapers which the trial Court characterized as 'again transcending, bridging, the orders made by the Court with reference to news articles.' In this connection appellant said: 'Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Bridges was a member of the Communist Party but had been elected to high office in it?' "

The record concerning this incident (Tr. pp. 567-568) is as follows:

> "Mr. Hallinan. Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Harry Bridges was a member of the Communist Party but had been elected to high office in it? What concern was there made for reservation——
>
> Mr. McMillan. Your Honor has instructed the jury not to read the papers.

The Court. Mr. Hallinan, am I entirely obtuse in the trial of this case? Or have we descended into another strata of judicial process? I admonished this jury categorically, unequivocally, and with every bit of vigor that I have,—which vigor is expending itself in colloquy with you—that you are not to read the newspapers (addressing the jury) under any conditions. And this Court, mindful of the admonitions to you, does not indulge himself in the reading of the newspapers. Now, Mr. Hallinan indirectly has given you part of what the headlines are, which in a direct reflection upon this Court's admonition to you.

Mr. Hallinan,——

Mr. Hallinan. Your Honor, all the paper did was repeat what counsel said to the jury yesterday. Now, they said that they would show that in conformity with Communist Party plans of keeping secret the membership of persons prominently identified, that membership cards issued to the defendant were issued in the name of Harry Bridges, that he was some kind of a secret, hidden conspiratorial sort of member; that he was elected under some sort of secret and guilty idea."

From this it affirmatively appears that appellant in making reference to the newspapers had brought to the jury's attention nothing which had not been contained in the opening statement of the prosecution. Certainly this did not constitute criminal contempt or contempt of any character.

It should be observed that nothing inflammatory and that nothing in the nature of an epithet is contained in anything said by appellant in this incident.

III.

THE MATTER OF GOOD FAITH.

This Court next considers the matter of appellant's good faith or lack of it in making his opening statement. This Court commenced this discussion as follows:

> "It is appellant's contention that in his opening statement 'he tried to tell the jury *first* that he expected to show government witnesses to be *liars, perjurers and low characters, who had conspired to give false testimony against Bridges. Second,* that the motives for giving such false testimony were to be found in hatreds engendered by labor disputes in which Bridges had taken part. *Third,* that some of the witnesses had appeared in proceedings to deport Bridges', and that the matters referred to constituted a valid defense. We are unable to view the statements and conduct of appellant *in such* a mild and diluted form.* It is true *that counsel might properly inform the jury in a temperate manner that he intended to impeach the veracity and character of opposing witnesses by the introduction of competent impeaching evidence.* Appellant did no such thing, however. *The most abusive language used and the vilest characterizations made were not in the form of a statement of what was expected to be proved but a direct statement by appellant of his opinion of the witnesses.* No other motive can be attributed to such statements and conduct than that appellant deliberately sought to inflame the minds of the jurors and unduly prejudice them in advance of the appearance of any witness in the witness chair. Appellant complains that the opening statement was continually interrupted by

* "such" relates to the contention of appellan
as above summarized by this Court

government attorneys. We think properly so. *Objections were interposed by counsel* and rulings made by the Court, *which were disregarded.* Justification for such conduct is attempted to be made upon the ground that the matters stated constituted a valid defense. *Counsel's opinion of the character of witnesses who he thought might be called was not evidence.* He could not validly say that he would prove the statements made because *no witness would be permitted to hurl the epithets* which seemed to flow from the mouth of appellant with such ease and facility." (Emphasis added.) (through the word "such")

Observe that this Court concedes that the charge that Government witnesses would be *"liars, perjurers and low characters"* would be "in a *mild* and *diluted* form".

A. CONCERNING VILE EPITHETS, ETC.

This Court will recall that Lewis Carrol had one of his characters in *Alice in Wonderland* say:

"Say a thing three times and it's true."

There is no doubt but that the trial Court repeated over and over again the charge that appellant was using abusive and inflammatory language, was making vile characterizations, was hurling vile epithets, was using vile and vituperative terms and the like. But the mere charging of such things, *no matter how often repeated,* does not make such things so.

Incident by incident, in the order selected by this Court, and in paragraphs printed, except for empha-

sized words, wholly in italics, we have pointed out, in the foregoing pages of this petition, the *absence* of inflammatory matter and the *absence* of vile epithets emanating from appellant. Does this Court have in mind incidents *other than those recited in the opinion?* If so, what are they and why has this Court neglected to mention them?

When it comes to the matter of epithets it seems to us that they are to be found in the charges made by the trial Court against appellant. They are in fact epithets because they assume and charge things against appellant where an examination of the record discloses that such assumptions and charges are without foundation. By making such unfounded assumptions and charges the trial Court has resorted to "name calling". Name calling, particularly where there is no factual basis for the name called, is what we understand an "epithet" to be. Moreover, while there is nothing vile in the words employed by the trial Court in making such assumptions and charges, it seems to appellant that such name-calling is *exceedingly vile* in its effect in that it is made the basis and the justification for sending him to jail for a period of six months under the stigma of criminal contempt. Moreover, appellant's characterization of the witnesses whom the prosecution would call were not nearly as inflammatory or nearly as abusive as the charges made by the prosecutor in his opening statement that the three defendants and the witnesses whom they would call (divers persons to the Grand Jury unknown) were members of the Communist

Party and perjurers and had conspired to commit perjury and to defraud the government. The charge of "Communist" today is not only inflammatory, it is, in the popular mind of the people of this country, a charge of perfidy, a charge of treason, a charge that the person desires to overthrow our government by force and violence and by trickery and deceit, and deliver the people of our nation into the slavery of a cruel, ruthless, unprincipled, godless and god-hating dictatorship. The opening statement of the prosecutor in this case, in effect, asked the jury to look at the three defendants and at all of their witnesses for horns and cloven hoofs and forked tongues.

B. NO WITNESSES WOULD BE PERMITTED TO HURL THE EPITHETS, ETC.

The prosecutor in his opening statement charged the defendants with perjury, with conspiracy and with having defrauded the government. "No witness would be permitted" to testify that the defendants did commit perjury or did commit conspiracy or did defraud the government. That is to say, such witnesses would not be permitted to so testify *using* the *epithets* (i.e. *the words*) perjurer, conspiracy and defraud. In this sense, but only in this sense, is it true "that no witness would be permitted to hurl the epithets" used by appellant. Every charge appellant made against the prospective prosecution witnesses was capable of being proved so in full substance and by competent, relevant and material evidence. That

this is so all this Court has to do is to read the decision of the Supreme Court of the United States and the concurring opinion of Mr. Justice Murphy in the case of *Bridges v. Wixon*, for, in effect, every characterization that appellant made of the prospective witnesses was made by members of the Supreme Court of the United States in the case of *Bridges v. Wixon*.

C. APPELLANT'S OPINION.

Let us repeat two statements contained in the above quotation from this Court's opinion.

> "The most abusive language used and the vilest characterizations made *were not in the form of a statement of what was expected to be proved*, but a direct statement by appellant of *his opinion* of the witnesses "and" he could not validly say that he would prove the statements made * * *"

These statements will bear painstaking analysis. They are windows in this Court's mind through which the mental processes of this Court can be viewed. And the mental processes in this instance run counter to the fundamental principles of the law of our land.

The defendant Bridges **knew**, not *thought* but **knew**, whether he was or ever had been a member of the Communist Party. If he was not and had not been a member of the Communist Party, he *knew*, not as a matter of opinion but as a matter of **absolute knowledge**, that no person *could* testify that he was or had been a member of the Communist Party *without com-*

mitting wilful and deliberate perjury. Under such circumstances, he *knew* also, and *knew positively,* that if two or more persons testified to the *same* incidents or acts of participation as showing that he was a member of the Communist Party those two or more persons were not only committing *perjury, but that they had* **conspired** *to commit perjury.* In addition, the defendant Bridges *knew* who the witnesses were who had testified against him in the two previous deportation proceedings. He *knew* what their testimony had been. He *knew* their histories and their background. He *knew* what Landis and Sears and Biddle and the justices of the U. S. Supreme Court had said about their character and credibility, and he **knew** to a **normal certainty** that only witnesses of the type, kind, background and character of those who had theretofore testified against him **could** be produced by the prosecution on the present trial.

At the trial the *law* **presumed** Bridges to be *innocent.* Appellant was the attorney of and spokesman for the defendant Bridges. *Appellant was in Court in no other capacity.* Because of this relationship of attorney and client, *Bridges' knowledge* became **appellant's knowledge,** not as a matter of fact but a matter of *positive law,* in so far as such knowledge was disclosed to appellant by Bridges. Indeed, even where such a defendant *lies* to his attorney by claiming innocence where he is in fact guilty, the law vests in the attorney, indeed, **imposes upon him,** *for the purposes of the trial,* a **knowledge** *that his client is* **innocent.**

As Bridges had pleaded "not guilty" it **must** be presumed that he had told appellant that he was not guilty and it **must** be presumed that appellant believed that Bridges was not guilty.

For the foregoing reasons the characterizations which appellant made of the prospective prosecution witnesses were not matters of ***his own personal opinion*** of those witnesses, but were matters of his **knowledge** concerning them: matters of his ***knowledge*** not only by legal presumption but also ***by legal compulsion.***

The statement by this Court to the effect that such characterizations were only a statement of appellant's ***opinion*** is tantamount to a holding that the defendant Bridges had no knowledge of being innocent of the charges against him and had conveyed no such knowledge of innocence to appellant. It is tantamount to a holding that the defendant Bridges ***was guilty*** of the charges against him and that appellant had no basis, ***other than personal opinion,*** for a ***belief*** that Bridges was innocent.

In this connection we think it important to direct this Court's attention to a statement made by the trial Court in its preface to its oral finding that appellant was guilty of criminal contempt, wherein the trial Court, by unmistakable implication, ***accused both Bridges and appellant*** **of being Communists**, or, in other words, evidenced a pre-judgment ***of Bridges' guilt and of appellant's*** **knowledge** ***thereof.***

Commencing near the bottom of page 774 of the transcript the trial Court said:

"I say to you, Mr. Hallinan, long after the case of United States v. Harry Bridges has become judicial history, long after this Court has gone to whatever happy reward judges may have, these courts will remain as beacons in our judicial system, wherein, we hope, expect and pray that the rights of men may be adjudicated without regard for station in life or race, color or creed.

"However, there is an anomaly apparent throughout the country today and *exemplified,* perhaps *in some of our more recent trials,* in that *those who cry so earnestly for protection under the mantle and cloak of our Constitution* of the United States *would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system.* If I permitted this matter to go on unheeded, it would, in my opinion, represent a tragic commentary on our system, orderly as it is, in the administration of justice."

The only possible pertinency of the trial Court's remark about "those who cry so earnestly for protection under the mantle and cloak of our Constitution" was to *accuse appellant* of being in that class and of being in the class of those who "would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system". The reference to recent trials was obviously a reference to the recent trial of a number of high-ranking Communists in New York *(U. S. v. Dennis)* wherein similar charges were made. Thus these statements by the trial Court *accused* appellant, *in effect,* and by unmistak-

able implication, *of being a Communist lawyer of a Communist client.*

It seems to us that this Court's statement to the effect that appellant's characterizations were but his opinions is indicative of the same state of mind, the same pre-judgment, the same ignoring of the presumption of innocence, the same refusal to realize that, for the purpose of trial, the *knowledge* of the defendant Bridges was, *as a matter of law,* the *knowledge,* and **not** merely the *personal opinion,* of appellant.

It is true that this matter of knowledge of appellant was *also* a matter of opinion. But insofar as it was a matter of opinion it was predicated on certain things, all of which were matters of official record in the trial Court and are of official record in this Court: they are all contained in the file of the case of *Bridges v. Wixon,* 144 Fed. (2d) 927.

What were such matters?

1. The Landis opinion in the first Bridges deportation proceeding (which was bodily incorporated in the record in the second Bridges deportation proceeding.)

2. The Sears opinion in the second Bridges deportation proceeding.

3. The Board of Review's opinion in the second Bridges deportation proceeding.

4. Attorney General Biddle's opinion in the second Bridges deportation proceeding.

5. The majority opinion of the U. S. Supreme Court in the case of *Bridges v. Wixon.*

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6. The concurring opinion of the late Mr. Justice Murphy in the case of *Bridges v. Wixon,* and

7. Even the dissenting opinion of certain justices in the case of *Bridges v. Wixon.*

Is an opinion derived from a reading and study of such judicial and quasi-judicial documents, accepting as true the findings in such documents, an opinion which springs from the mind of the individual advocate who so reads and studies such documents? Can it be said to be an opinion *and nothing more? Can it be said to be an opinion the holding and expression of which* is evidence of bad faith? It seems to us, and we believe that it will seem to other members of the bench and bar, that affirmative answers to these questions are implicit and inherent in the opinion filed by this Court.

Let us turn now to this Court's statement that appellant's characterizations "were not in the form of a statement which was expected to be proved".

Does the record support this assertion? It does not.

Before appellant's opening statement had gone one transcript page appellant said to the jury (Tr. 490):

> "Now, as has been said to you too, the statements of counsel in an opening statement are not evidence and cannot be accepted by you as evidence, yet it must follow, it must be taken for granted, that in making an opening statement an attorney *puts his credit at the risk of what he says in this statement. He would certainly expect to excite the animosity of the jury by saying something that he did not sincerely believe and that he did*

not sincerely expect to prove. Therefore, in what I say in the opening statement, you may take this, and I have bound myself to this obligation, that anything that we tell you we will prove conclusively by evidence introduced from witnesses upon the stand—not by any arguments, suggestions, or anything of that kind, but by clear and unequivocal evidence.

"But one might say, well, how can you assume to prognosticate so accurately what you are going to be able to do? And I will say this, that we can tell you *because it is an old story.* As has been indicated to you before,—and in suggesting this I am not going to mention the results of these matters or comment on the propriety or impropriety of them—but this is the fifth inquiry into this subject."

On page 528 of the transcript appellant said to the Court in the absence of the jury:

"Now, if I should say to this jury that I will prove a conspiracy of this kind and at the end of it they say, 'He has lied to us and he has deceived us,' *is that going to help my client?* I say I will prove the conspiracy to put perjured testimony on the stand, to say that Mr. Bridges was a Communist."

And on page 552 of the transcript appellant said to the trial Court in the presence of the jury:

"I suppose if I deceive this jury, or I say something that I can not prove to the extent that I have promised to prove it, *then my credit with the jury and the credit of the entire defense lapses. And I am willing that that should be so. Now, I can't see how I could be more sincere than that.*"

There is much more in the statement of this Court concerning the good faith of appellant to which we could and would take exception did time permit. It will suffice for us to say that both in the foregoing and in the remaining portions of this Court's opinion concerning good faith this Court in effect overrules the United States Supreme Court's decision in the case of *Bridges v. Wixon* with respect to what is relevant and material by way of defense where the charges are as they are in this case and in effect overrules the decision of the Supreme Court of the United States in the case of *Alford v. U. S.*, 282 U.S. 687, with respect to the degree of protection which a trial Court should give to prosecution witnesses. In the latter case the United States Supreme Court on page 692 in reversing this very Court said "But no obligation is imposed on the Court, such as suggested below, to protect a witness from being discredited on cross-examination short of an attempted invasion of his constitutional protection from self-incrimination properly invoked."

IV.

THE CROSS-EXAMINATION OF GARNER.

This Court commences its discussion of this subject as follows:

> "We now consider the charge of contempt as it relates to the cross-examination of witness Garner. It is charged in the certificate that 'Mr. Hallinan had launched into a dissertation upon the deportation proceedings.' The trial court in mak-

ing this statement apparently referred to a question put by appellant in the cross-examination of the witness Garner, who had identified himself as an attorney for the Bureau of Immigration and Naturalization. The question was: 'Is it your custom as an attorney for the Government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?' In response to an objection made by the Government the Court stated that no issue with respect to the prior deportation proceedings against Bridges was before the court and that what the witness had done 'with respect to matters of prior consequence' would not help determine any issue in the case before the court."

The record pertaining to the matter recited in the above statement of this Court appears on pages 705 and 706 of the transcript and is as follows:

"Q. Is it your custom as an attorney for the government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?

Mr. Donohue. I object to the question, if Your Honor please; his custom in prior matters is not in issue. The question is what he did in this instance.

Mr. Hallinan. That would help bring out what he did here, what resulted when the ordinary course of events has been followed.

The Court. I remark and I reiterate, Mr. Hallinan, as I did with your colleague, Mr. MacInnis, that there is no *issue* with respect to the deportation proceedings before this Court, there is no *issue* upon which the Supreme Court decision

would be controlling as a matter of fact or as a matter of law. Now, what this man may have done with respect to matters of prior consequence would not aid or determine any issue in this case.

Mr. Hallinan. Of course, Your Honor, we will still have to go ahead and offer such evidence, attempt to adduce such matters on cross-examination, as we may feel advised. And while, of course, we are bound by the rulings of the Court, we can not afford to fall into the folly of refraining from asking questions which we deem proper, and having a ruling upon them, so as to preserve a correct record. Now, I understand that an objection was made to the last ruling, but I have heard no ruling on it.

The Court. The objection is sustained."

This Court makes no reference to the above statement by appellant. Appellant made that statement to avoid even the *appearance or suggestion* of contumacious conduct. By that statement appellant *implicitly invited* the trial Court to make a ruling forbidding appellant from asking questions of the character which he announced he was going to ask and by such a ruling affirmatively establish of record a foreclosure which could not be held of an appeal by the defendant Bridges to be too uncertain to support the claim that the ruling had in fact and in law amounted to a foreclosure. Indeed, appellant by the words "* * * of course, we are bound by the rulings of the court, * * *" *told the trial Court that should it make such a ruling of foreclosure appellant would accept it as sufficient for the preservation of the record.*

The trial Court did not accept appellant's implicit invitation to make such a ruling. The ruling made was limited to sustaining the objection to the question already asked and did not extend to future questions. By not making a ruling, such as appellant invited, the trial Court acquiesced, or, at least, *seemed to acquiesce,* in the course which appellant announced he was about to follow. Indeed, although the record does not show it, as appellant completed the statement "we cannot afford to fall into the folly of refraining from asking questions which we deem proper, *and having a ruling upon them, so as to preserve a correct record.*", the trial Court nodded his head. The reason why the record does not show this is because appellant at that time had no idea that he, himself, was then on trial or had any need to make a record for *his own,* as distinguished from the defendant Bridges, *protection.*

This Court continues its statement as follows:

> "It appears that almost immediately after this ruling was made appellant asked two other questions concerning the witness's acquaintance with the decisions in the prior deportation proceedings. There followed a prolonged argument by counsel on both sides, most of which was outside the presence of the jury. The certificate qnotes the reiteration, during this argument, of the Court's ruling that 'these matters of prior consequence [have] no legal bearing upon this matter.' Appellant's response to this ruling was: 'I will simply have to take the position, your Honor, that I consider very much in error your position, and I will have to continue to ask the questions and build a

record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury.' "

The prolonged argument to which this Court refers commenced on page 706 and terminated on page 734 of the transcript—a matter of some twenty-eight transcript pages. The incident to which this Court last refers was as follows (Transcript pages 732 to 734):

"The Court. Now, we will just take that primitive notion as to that phase of the matter. You make the bland assertion that this witness on the stand, Mr. Garner, has in some manner, at some place unidentified,——

Mr. Hallinan. 'To the grand jury unknown.'

The Court. ——joined a conspiracy. When he joined the conspiracy, of course, is problematical, speculative and wholly in the limbo of uncertainty. He has joined in it some time. This unwholesome conspiracy that started in 1934?, is that the date? Or thereabouts. And that this chain of co-conspirators that is gained and augmented in force and number, until now it reached the proportions of 125 people, all of them, all of them are out of step with Harry Bridges.

Now, to ask this Court to relax the vigilance which is traditional under the rules of evidence as I learned them, and as I think we both learned them together, would be *in my opinion* to broaden the scope to a point of unheralded dominion, and to a point wherein there would result prejudice to the prosecution as well as to the defendants at bar. *I think*——

Mr. Hallinan. I will simply have to take the position, Your Honor, that I consider very much in error your position. And I will have to continue to ask the questions and build a record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury.

The Court. You ask me to relax the rules of evidence upon that basis, and I say to you that I am not going to relax the elemental rules of evidence that apply on cross-examination of this witness.

Mr. Hallinan. Why, I have read off the rules, Your Honor, and it is not a question of asking you to relax them, it is a question of whether you will restrict them and whether you will put a new circle around the rules of evidence and say that certain questions that are proper to be asked may not be asked. That is the point. It isn't a question of asking you to relax them, it is a question of protesting against an improper stricture of the rules of evidence.

The Court. Mr. Hallinan, you have my ruling. You may call the jurors."

This Court quotes appellant's statement about continuing to ask questions as though it were an act of defiance of the trial Court. It was nothing of the kind. It was a *renewal* of appellant's previous *implicit invitation* to the trial Court to make a ruling *explicitly* forbidding appellant to ask questions along the line indicated by him: questions which appellant said he would *have to ask to build a record.*

Again the trial Court failed to make such a ruling.

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It is true that in those incidents appellant's statements were argumentative in form. But not one bit more argumentative in form than were the statements of the trial Court. This Court has accurately described the twenty-eight pages of the record as being "a prolonged argument", but it was not only "by counsel on both sides", as this Court says, but one in which the trial Court participated *with equal argumentativeness, as the above excerpt from the record plainly reveals.* Moreover, the argumentative portion of such argument took place in the absence of the jury.

This Court continues its discussion as follows:

> "The record discloses that the very first question asked the witness Garner by appellant after the jury was reseated was: 'If you did not read all the decision of the Supreme Court, at least you read most of it, is that right?' Objection was made and sustained. The question immediately following was: 'Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?' Objection was made and sustained."

We have no complaint with what the Court says in this paragraph, but we have a serious complaint concerning what this Court leaves out between the end of this paragraph and the beginning of the next one.

The two questions, objections and ruling mentioned in this paragraph occur on pages 734 and 735 of the transcript and were followed immediately, on pages 735 and 736, by this:

> "Mr. Hallinan. Q. Have you any independent knowledge—now, aside from any designation of

any court—have you any independent knowledge of your own or information from any person in the government's employ that at any time during the course of this proceeding or of the previous—We will withdraw that—the course of this proceeding, any wire-tapping was done on Harry Bridges' telephone?

Mr. Donohue. I object, if Your Honor please, and now suggest to Your Honor that it would appear from the fact that Mr. Hallinan has intentionally asked three questions, all in my judgment contrary to the ruling of this Court, that he is doing exactly what he said he would do, and that is, despite Your Honor's ruling, he would continue to ask these questions for the purpose of preserving some kind of record. I ask that he be admonished at this time not to continue this line of questioning.

Mr. Hallinan. May I be heard in that, Your Honor? As I understand it,——

The Court. Just a moment, Mr. Hallinan. The objection is sustained, the jury is admonished to disregard it.

Mr. Hallinan. Your Honor, this does not relate to any hearing, this means presently and now. I want to know if this gentleman indulged in any illegal activity in connection with procuring a verdict in this case.

The Court. You had it in a two-way thrust before.

Mr. Hallinan. I withdrew that. I said I withdrew that.

The Court. You may answer the question."

Here we find Mr. Donohue, the chief prosecutor, *explicitly requesting* the trial Court to make a ruling of

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the character which appellant had twice before *implicitly* invited. The trial Court ignored Mr. Donohue's *explicit* request just as it had twice before ignored appellant's *implicit* invitation. Why? There is only one possible answer. Because the trial Court wanted **not** to make any such broad ruling of exclusion. That this is so is made manifest by the fact that *in this very instance* the trial Court, after his sustaining the objection to the question, reversed itself and **permitted the witness to answer.**

What does this signify? It signified that **none** of the previous rulings of the trial Court *had been intended by the trial Court* to foreclose appellant from asking any and all questions along "this line", to use the expression of Mr. Donohue. And it signified that the *trial Court did not intend its ruling* **in this instance** to have any such broad prohibitory effect.

What did this mean to appellant? It meant that *only* by continuing to ask questions along *"this line"* could he make the record show *just how broad* the Court's ruling of exclusion was.

Appellant was concerned with having the record show *not only error* in the limitation placed upon the cross-examination of the witness Garner with respect to his credibility, but such *drastic error* that an Appellate Court could not say, on an appeal by Bridges, *that the error was not prejudicial.* He had a right to do this. Indeed, he had a duty to the defendant Bridges to do this. Not only a moral duty but a *legal duty:—a duty imposed upon him as an officer of the Court.* He could do this only by continuing to ask

"this line" of questions until he felt certain, based upon his knowledge of *how frequently* Appellate Courts are of the opinion that what appears to the trial lawyer to be *prejudicial* is only *harmless* error, that the error in this instance was *so grave* and was *so apparent* that it *could not be dismissed as harmless* by the Appellate Court.

It is because appellant tried to discharge this obligation that he now finds himself adjudged guilty of criminal contempt.

To return to this Court's opinion this Court continues as follows:

> "Later came a question with respect to the witness's knowledge of wire-tapping prior and up to the time that Bridges was admitted to citizenship. Objection to this question was made and sustained. Another question concerned the witness's knowledge of wire-tapping at the time of the two previous deportation proceedings. Objection was made and sustained and the jury admonished to disregard any implications in the question. The witness was asked by appellant whether he had had any knowledge of wire-tapping before the deportation proceedings, whether he had protested against illegal wire-tapping, whether he had stated to any government official that he would not be a party to an illegal effort to injure Bridges. Objections to all these questions were sustained."

Let us look at the last of the incidents mentioned in this portion of the opinion. The record (pages 739 and 740 of the transcript) reads as follows:

Mr. Hallinan. Q. Did you at any time in the course of your connection with this case state to any official or agent of the government that you would not be a party to an illegal effort to injure this man?

Mr. Donohue. I object to the question, if Your Honor please, and I again ask Your Honor to admonish counsel to confine his cross-examination to that well established rule of law to which Your Honor invited his attention just a few moments ago.

The Court. The objection is sustained."

Here we find Mr. Donohue *again* asking the trial Court to admonish appellant not to ask questions along the same "line" and we find the trial Court *again* failing to comply with the prosecutor's request.

This Court continues:

"The witness was then asked whether he had read in one of the prior deportation proceedings that 62 government witnesses had been rejected by the trier of fact as liars and perjurers. The objection to this question was also sustained. It was followed by an almost identical question with reference to a different prior deportation proceeding."

Let us look at the second of these two incidents (Tr. pp. 741-742):

"Q. Now, getting away from these two proceedings that seem to involve me in so much criticism, you do know this, that 60 witnesses, different from those that testified before Landis, testified before Sears and that Sears rejected all but one of them as liars and perjurers; isn't that right, Mr. Witness?

Mr. Donohue. I again object——

Mr. Hallinan. Might I be heard on this, Your Honor?

Mr. Donohue. ——and I again ask Your Honor to instruct counsel that he confine his questions to the limitations set by Your Honor just a few minutes ago, and suggest to Your Honor that his failure to do so is only a deliberate and purposeful plan on his part to call to the attention of the jury matters which as a matter of law Your Honor has said may not be properly called to their attention."

There then followed a long statement by appellant at the end of which on page 744 the trial Court said:

"The objection is sustained."

Thus three times did the prosecutor explicitly request the trial Court to make a ruling which would foreclose appellant from asking questions along the same "line" and thus in each of these three instances did the trial Court *refuse* the request *by failing to take notice of it.*

This Court then makes mention of three other questions, objections and rulings sustaining the objections. They were questions along the same line but directed to different phases or different incidents. They need not be particularly discussed.

There is one more excerpt which we desire to quote from the record, however. As the witness Garner was about to leave the stand (Tr. pp. 753 to 755) the following occurred:

"Mr. Hallinan. As I understand it, your Honor, there are questions, as I said, I wanted

to ask this witness out of those two opinions and I suggested, since I didn't want to make it appear even that I was transgressing upon the court's ruling, that this witness would be further cross-examined in the absence of the jury. Isn't that the rule that you made? Isn't that what you said would be done? Otherwise what I want to do is ask specific questions now out of those two documents and ask him whether those are parts of the things that he said he read in them. I do not want to seem to be showing bad faith. I could probably ask them before the jury and allow objections to be sustained, but I do not want to entrench even on the spirit of the court's ruling.

Mr. Paisley. Your Honor, it has always been my understanding that once counsel understands the court's ruling as to allowing testimony, he cannot stand up before the court and repeatedly ask the same questions over again.

The Court. I know of no such rule that would permit Mr. Hallinan to adopt that course of procedure or practice.

Mr. Hallinan. Might I suggest this, your Honor: If not then, I would have to ask them in the presence of the jury, and then that is going to excite some argument. I want to ask the witness now—I want to read off portions of the decision of the Supreme Court and Judge Landis' decision and ask him if those were parts that he read before he asked these two defendants whether or not they were members of the Communist Party. I want to ask him the specific things because he says he does not believe he read them all, that he read excerpts from them. I want to find out what those excerpts were and whether those excerpts would bear upon the probability as that he then

asked these other questions. I have to, to be consistent, ask those questions. If you wish, I will go ahead and ask them in the presence of the jury, unless you will tell me now, if you wish, that I will not be permitted to ask any such questions, and then I will just make an offer of proof and let it go at that.

The Court. Counsel, thus far you have not had much regard for my rulings, whether I made them formally or informally, in the presence of the jury or in the absence of the jury. It is a sort of travesty at this late stage again to tell me about it. Do you have an objection to it, counsel?

Mr. Paisley. I certainly do, your Honor.

The Court. The objection is sustained.

Mr. Hallinan. There isn't any question, your Honor, to which an objection could be made.

The Court. I thought there was."

Here we find appellant explicitly suggesting to the trial Court that it make an explicit ruling and we find the trial Court avoiding to make such an explicit ruling even at this late stage by accusing appellant of not having shown "much regard" for the rulings of the trial Court "whether I made them formally or informally".

The latter statement by the trial Court expresses the defect in the heart of the charge of contempt made against appellant. The trial Court's complaint was that appellant had not shown "much regard" for the informal rulings of the trial Court, 1.e. ~~That is~~ those expressions of opinion which do not amount to rulings as far as the case of the defendant Bridges was concerned. The trial Court was try-

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ing to control the course of the trial not by making rulings which the defendant Bridges could make use of on appeal but by placing a personal pressure on appellant in his status as an officer of the Court as distinguished from his status as the attorney for the defendant Bridges.

This Court continues its discussion of this subject as follows:

> "Appellant extensively argues the general propriety of bringing in the defenses disclosed by the above related questioning. *The vice found here is not in bringing in the defenses* but the manner in which it was attempted to be accomplished. All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial Court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere. But, argues appellant, before the alleged error can be considered elsewhere, the record *must* be *sufficiently explicit* to enable a reviewing court to understand the nature and purpose of the excluded evidence. *With this statement we are in entire agreement* but are unable to find in the record before us justification for the conduct of appellant on that ground. We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made

long before appellant desisted." (Emphasis added.)

four during the course of that cross-examination

In view of the fact that the trial Court **on six separate occasions** (the first at the beginning of appellant's cross-examination of the witness Garner, and the last at the end of that cross-examination), *patently avoided* the making of an *explicit* ruling, what basis is there for this Court's holding to the effect that the trial Court *did make* **an explicit ruling?** We submit that there is not only *no* basis for such holding, but that the record *affirmatively establishes* that there is *no basis* for such holding. We submit, also, that in view of the fact that the trial Court six times avoided the making of such a ruling and in one instance permitted the witness to answer a question along the same "line", reveals that there is *no basis* for this Court's conclusion viz.:

> "We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made long before appellant desisted".

Moreover, if "a sufficient record was made long before appellant desisted" *at what point was such a record made?* More particularly, in view of the six avoidances by the trial Court to make an *explicit* ruling, *at what point could appellant have* **safely** *assumed that the* **non-explicit** *rulings up to that point made by the trial Court* **would be regarded by this Court as being the equivalent of an EXPLICIT ruling?**

We have one other criticism to make concerning this Court's statement in relation to appellant's cross-examination of Garner. This Court says:

> "We realize the inadequacy of the cold record to fully present the situation as it existed in the courtroom during the turbulent times portrayed by this record".

It seems to us that by these words this Court admits that it has gone *beyond* the *"cold record"* to imagine "the situation as it existed in the courtroom" *in order to find justification for affirming the judgment* and, in such *imagining,* has *assumed* in appellant's disfavor *the* existence *of things* not *presented in the record.* In other words, we see in these words of this Court an *admission* that the conviction of appellant is being affirmed *in part* upon the basis of things *not charged in the trial Court's certificate* and the existence of which appellant has had no opportunity to refute.

V.

THE OPINION CONTRAVENES THE RIGHT OF COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

The Sixth Amendment to the Constitution of the United States provides:

> "In a criminal case the accused shall enjoy the right * * * to have the assistance of counsel for his defense".

This provision guarantees to a defendant in a criminal case the right of counsel not only in name but in substance. It guarantees to him the right to the aid

of counsel who in presenting his defense is not bound by any rulings of the trial Court other than those which are so explicit as to constitute error on an appeal by him from a judgment of conviction should such rulings be erroneous. He is guaranteed the right of a counsel who is unfettered in the presentation of his defense by *expressions of opinion* by the trial Court which do not amount to rulings and unfettered by *positions* taken by the prosecutor which have not been converted by the trial Court into rulings.

This provision of the Sixth Amendment not only confers such a right upon a defendant in a criminal case but, by necessary implication (i.e., necessary to make the provision itself effective), it confers a corresponding right upon an attorney who is serving as counsel for a defendant in a criminal case. This is to say, an attorney while serving as counsel for a defendant in a criminal case is guaranteed by this constitutional provision the right to serve as such without being subjected to restraints which are not also and equally imposed upon the defendant, himself. **He has the right to perform the functions of an advocate.**

The opinion of this Court **reveals on its face** that appellant is being punished for disregarding **"opinions expressed"** by the trial Court and for disregarding a **"position taken"** by the prosecutor.

The opinion further shows on its face that appellant is being punished for having expressed opinions (when, according to this Court's opinions, should not have been expressed) where the subject matter of such opinions was subject matter within the *knowledge* of the defendant Bridges and, therefore, within

the *knowledge* of appellant(for the purposes of the trial,)not as a matter of fact *but as a matter of law, as a matter of legal compulsion.*

We have hereinbefore mentioned the status of defense counsel in totalitarian countries. *If this opinion is allowed to stand* it will set a precedent for divesting defendants in criminal cases of the right of counsel. It will set a precedent for a trial judge in a Federal Court to say to a defense counsel:

> "I am *not going to limit you* in your presentation of the defense. I am not going to make any *ruling,* and, more particularly, I am not going to make any *explicit ruling,* to serve as a predicate for a claim of error on appeal by the defendant should he be convicted. But I am going to *express the opinion* to you as an individual that you should not raise any question concerning the character or credibility of any prosecution witness, and you should not do or say anything which runs counter to any position taken by the prosecutor with respect to how the case for the defense should be presented, and you should not give voice to anything which is within the knowledge of the defendant which is not, as a matter of fact, within your own personal knowledge, which in any way reflects upon any witness called or to be called by the prosecution, and I am going to warn you that if you do not comply with this *expression of opinion* as fully as you would if it were an explicit order binding upon the defendant, I am going to find *you* guilty of criminal contempt and I am going to sentence *you* to jail for a period of six months and I am going to order *your* name stricken from the roll of attorneys permitted to practice in this Court".

Appendix page 93

We raise this point, and especially set up and claim it, in this petition in order to preserve our right to raise this point in an application to the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied.

VI.

THE OPINION CONTRAVENES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The only hearing accorded to appellant as a matter of right by the law is a hearing on appeal in this Court.

The opinion of this Court, *if it is allowed to become the decision of this Court,* will have the effect of depriving appellant of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It will do so by granting to appellant a hearing *in form only* and by denying him a hearing in substance and on the merits.

It will do so by accepting the charges made by the trial Court as true where the record not only does not sustain such charges but affirmatively establishes that such charges are false.

We contend that this transcends mere error, that it transcends an error in judgment or in the exercise of discretion, that it constitutes a positive violation of appellant's constitutional right to be accorded due process of law before being deprived of his liberty.

We raise this point and especially set up and claim it in order to preserve our right to raise this point in an application in the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied.

VII.

THIS COURT SHOULD GRANT A REHEARING IN THIS CASE BECAUSE THIS COURT IN THE PRESENT OPINION HAS FAILED TO PASS ON OR MENTION THE APPEAL OF APPELLANT FROM THE ORDER OF THE TRIAL COURT STRIKING THE NAME OF APPELLANT FROM THE ROLL OF ATTORNEYS PERMITTED TO PRACTICE AS ATTORNEYS IN THE TRIAL COURT.

VIII.

THIS COURT SHOULD GRANT A REHEARING IN THIS CASE BECAUSE IT HAS FAILED IN THE PRESENT OPINION TO PASS UPON THE ISSUE RAISED BY APPELLANT THAT THE TRIAL COURT, BY REASON OF LAPSE OF TIME HAD LOST JURISDICTION TO CERTIFY APPELLANT IN CRIMINAL CONTEMPT UNDER RULE 42(a) FOR MATTERS OCCURRING DURING THE OPENING STATEMENT.

IX.

THIS COURT SHOULD ACCORD A REHEARING BECAUSE THE OPINION OF THIS COURT IS IN CONFLICT WITH THREE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, VIZ.:

(1) With the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon*, 326 U.S. 135, with respect to what is

competent, relevant and material by way of defense where the charge, or one of the charges, is that the defendant is or has been a member of the Communist Party;

(2) With the decision of the Supreme Court of the United States in the case of *Alford v. U. S.*, 282 U.S. 687, with respect to the degree of protection which a trial Court owes to and should give to witnesses for the prosecution; and

(3) With the decision of the Supreme Court of the United States in the case of *U. S. v. United Mine Workers*, 330 U.S. 258 concerning whether in a case of contempt the discretion to fix the punishment lies with the trial Court or with the reviewing Court.

We respectfully submit that a rehearing should be granted for the reasons and for each of the reasons stated in this petition.

Dated, San Francisco, California,
June 21, 1950.

Respectfully submitted,
GEORGE OLSHAUSEN,
ROBERT W. KENNY,
Attorneys for Appellant and Petitioner.

WILLIAM F. CLEARY,
Of Counsel.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VINCENT HALLINAN, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

No. 12,424

May 23, 1950

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, Chief Judge, and STEPHENS and ORR, Circuit Judges.

ORR, Circuit Judge:

Appellant appeared as attorney for the defendant in a case entitled United States of America v. Harry Bridges, et al. The action was tried in the United States District Court for the Northern District of California, Southern Division, Honorable George B. Harris, District Judge, presiding.

During the course of the trial a judgment of contempt was rendered against appellant. He appeals and makes the following principal contentions:

1. The record does not show contempt.

2. That by waiting one day subsequent to the commission of the alleged contempt, the Court lost its power to punish summarily under Rule 42(a) but could proceed only on notice and hearing under Rule 42(b). Furthermore, since the matter is properly under Rule 42(b), the Court was disqualified to pronounce judgment.

The trial Court filed a certificate setting forth the facts on which it based the judgment of contempt, in conformity to the

Note: All underlining and typewritten notes added by petitioner to facilitate reference and comparison.

requirements of Rule 42(a). Consideration of the questions involved requires a rather lengthy statement of the conclusions reached by the Court and the reference to the record, as set forth in the certificate. At times we make reference to portions of the record not referred to in the certificate: this for the purpose of assisting in our determination of whether the conduct of defendant, upon which the judgment of contempt was predicated, was in good faith. The portions of the record to which we refer were designated by appellant on this appeal. In considering portions of the record not referred to in the certificate we have not overlooked the requirement that if the judgment is to be sustained the conduct complained of in the certificate must in itself constitute contempt. We find that it does.

The rulings and assertions made during appellant's opening statement contain several lines of thought. For clarity we consider these rulings and assertions separately according to the subjects with which they deal. The first of these subjects is labor union disputes.

In pronouncing the judgment of contempt the Court states: "Mr. Hallinan, unbridled again, lapsed into a violation of the orders. At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in on an opening statement and to matters which should not have been brought before the jury." The record pertaining to this incident shows the following:

1st incident

In the course of his opening statement appellant stated: "Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have all observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility." The Court thereupon "admonished" appellant that "we are not trying warfare or alleged warfare between any union or any group and the like." While the certificate makes no reference to prior admonitions the record discloses this to be the fourth time after appellant began his opening statement that the Court had expressed the opinion that historical accounts of labor union activities in which Bridges had taken part were immaterial, were

inflammatory or were far divorced from the indictment before the court.

Subsequently, appellant again began a recital of a history of the growth of the C.I.O., and its expulsion from the A.F.L., which was said to have been accompanied by charges that the C.I.O. and certain of its leaders, including Bridges, were communistic. This recital was objected to and the objection sustained. The Court, in its certificate, then refers to a "long dissertation" by appellant concerning "some internal warfare between the C.I.O. and the A. F. of L." It appears of record that immediately after the sustaining of the above objection, appellant made some statement concerning the affiliation of Bridges' I.L.W.U. with the C.I.O. and began a further discussion of a Maritime Federation of the Pacific. Objection was again made and sustained. Immediately thereafter, in disregard of the ruling, appellant continued with the discussion of the Maritime Federation of the Pacific, and its alleged control by Harry Lundeberg, who appellant stated would be a government witness, and to whom he referred in derogatory language. Objection was made and the Court said: "What Mr. Hallinan has to say is in reality that type of matter that may be reserved for closing argument, if the facts demonstrate it. • • • I think, Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time." The certificate recites that only a few seconds or minutes later, appellant again "launched into the same demeanor, same conduct, persistent, studied as it was." From the record we learn that when appellant resumed his opening statement, his very first sentence had to do with quarrels between Bridges' union and the A.F.L. He went on to charge that Lundeberg and another labor leader were joined in their fight against Bridges and the latter's union by employer groups, goon squads, killers and perjurers. After the statement that certain government officials also joined in this persecution of Bridges, although other "upstanding, granite-honest" government officials had gone out of their way to protect him, another objection was interposed and sustained. Immediately thereafter appellant said, "the strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges' arrest on a deportation inquiry to

2nd incident

3rd incident

4th incident

5th incident

6th incident

be issued by the Secretary of Labor." Appellant also referred to the passage of a "bill of attainder" against Mr. Bridges by the United States House of Representatives, and also stated that "Mr. Bridges has made the mistake of not taking the $50,000 that was offered to him back in 1934 to throw the strike and go back to Australia." Again objection was made and again sustained, and appellant then referred to the labor situation in Hawaii as "the renewal of about what had happened in San Francisco—poison gas and clubs for the workers * * *." Again objection was made and again sustained.

The next type of matter found in the opening statement consists of direct attacks upon the credibility and character of anticipated opposing witnesses. The Court, in the absence of the jury, stated that in its opinion appellant had, in his opening statement, been "anticipating much of the Government's case, indulging in speculation on speculation," and "creating an atmospheric quantity at this stage designed to prejudice and inflame the jury." Reference is made to Government counsel's statement as to the position of the Government. This, the record discloses, was to the effect that appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement. Appellant then resumed his opening statement. We learn from the record and certificate that appellant referred to Harry Lundeberg as "one of the most remarkable of the witnesses that will be produced," "like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas, a man who has been arrested for brawling and assaults in half the courts of the world." Objection was again made and the Court stated: "This wild anticipation of the Government's case is to my mind novel," and ruled that "these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time." The Court also specifically instructed the jury to disregard the statements about Lundeberg's arrests in all parts of the world. Only a few seconds later, appellant "launched into the same demeanor, same conduct, persistent, studied as it was." The subsequent statements included assertions that the defense would prove that Lundeberg and another labor leader employed a known murderer to kill Bridges and did in fact send a man to New Orleans who killed a C.I.O.

organizer there. Appellant also asserted that the labor leaders had under their control goon squads, killers and perjurers.

Appellant further stated: "Now, as early as 1936 there had been introduced into Harry Bridges' union and into his personal office as his private secretary a woman employed by the Waterfront Employers Association, and she was also the mistress of Mr. Harry Lundeberg." Objection was made and appellant gave as justification for the statement his purpose of showing Bridges' consciousness of being watched by agents of his enemies, who would use against him any detected activities in the Communist Party. The Court then said, among other things, that an opening statement was not a sounding board for giving vent to immaterial matters, and that it was very unfair to make such a reference to the woman. After some discussion, the Court stated to appellant: "You characterized all of these witnesses as perjurers, low people, characterized them with vile, vituperative terms. '125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now I think it highly unfair to this Court, indulgent as I have been with you, to continue on that line or that particular vein."

The certificate quotes a subsequent statement by the Court, "again responding to an objection urged by Mr. McMillan, and to matters that were incompetent and irrelevant." It is shown by the record that these matters were specific references to three named individuals who appellant asserted were ex-Communists and would be Government witnesses. Each of the references also included derogatory remarks. The Court then remarked: "What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this court of the general characterizations and vituperations." The record shows that this remark of the Court was made the basis of a ruling. Appellant replied: "All right, and that is just what I say, your Honor." The Court answered: "That procedure * * * has never been the procedure in the federal courts. I sustain the objection."

Later in the certificate reference is made to another objection. The record discloses the objectionable statements to have consti-

11th incident

12th incident

13th incident

14th incide

tuted a wholesale attack on 125 persons who appellant asserted would testify for the Government. Appellant accused them of traveling "any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers there, willing to say anything that would bring them a few dollars * * * for fame or what they call fame * * *. They are perjurers of the worst kind * * * spies, turncoats, the very swill of humanity * * *."

14th incid

Another subject of rulings and statements was the asserted wire-tapping and "espionage" activities of Government agents against Bridges. Appellant stated that in Seattle in 1937, "agents of the Immigration Department dictographed his [Bridges'] hotel room and tapped his telephone wire." The Court interrupted and the prosecutor, upon inquiry from the Court, renewed his assurance that no illegally obtained evidence would be introduced. The Court then ruled as follows: "The objection is sustained, the jury is admonished to disregard the statement, of any kind, character or description, bearing upon that matter."

wire tappi

and

Appellant made a subsequent reference to espionage activities of the F.B.I. against Bridges. Objection was again made and again sustained. Almost immediately after the sustaining of the objection appellant referred to "the boyish workings of the F.B.I." and stated that the defense would prove that scores of F.B.I. agents had for years been following Bridges, interviewing and threatening his friends and associates, trying to build up a case.

espio

Two incidents occurred during arguments addressed to the trial Court which it deemed contumacious. Appellant referred to the fact that he had only three weeks to prepare. The Court asked him if he did not have the assistance of associate counsel. Appellant replied: "Yes—who made the motions that your Honor treated with contempt."

15th incid

Appellant referred to headlines in newspapers which the trial Court characterized as "again transcending, bridging, the orders made by the Court with reference to news articles." In this connection appellant said: "Did your Honor see the headlines in today's papers, which said that the Government was going to

16th incid

Appendix page 102

prove not only that Bridges was a member of the Communist Party but had been elected to high office in it?"

It is appellant's contention that in his opening statement "he tried to tell the jury *first* that he expected to show government witnesses to be liars, perjurers and low characters, who had conspired to give false testimony against Bridges. *Second*, that the motives for giving such false testimony were to be found in hatreds engendered by labor disputes in which Bridges had taken part. *Third*, that some of the witnesses had appeared in proceedings to deport Bridges", and that the matters referred to constituted a valid defense. We are unable to view the statements and conduct of appellant in such a mild and diluted form. It is true that counsel might properly inform the jury in a temperate manner that he intended to impeach the veracity and character of opposing witnesses by the introduction of competent impeaching evidence. Appellant did no such thing, however. The most abusive language used and the vilest characterizations made were not in the form of a statement of what was expected to be proved but a direct statement by appellant of his opinion of the witnesses. No other motive can be attributed to such statements and conduct than that appellant deliberately sought to inflame the minds of the jurors and unduly prejudice them in advance of the appearance of any witness in the witness chair. Appellant complains that the opening statement was continually interrupted by government attorneys. We think properly so. Objections were interposed by counsel and rulings made by the Court, which were disregarded. Justification for such conduct is attempted to be made upon the ground that the matters stated constituted a valid defense. Counsel's opinion of the character of witnesses who he thought might be called was not evidence. He could not validly say that he would prove the statements made because no witness would be permitted to hurl the epithets which seemed to flow from the mouth of appellant with such ease and facility. Of course, counsel may, and often does, in argument to the jury, after the evidence has been presented, give the jury the benefit of his opinion of the veracity of the witnesses and the character and weight of testimony presented. That is the orderly manner and proper time to do so and the full duty which a lawyer owes

to his client in this respect may then be fully discharged. A trial court has the duty of safeguarding the rights of all parties before it, and the United States of America was a party to the criminal action. Witnesses required to appear are entitled to protection from unjustified character assassination and villification and a court is not in a position to determine the extent to which it may properly allow counsel to comment upon the character of a witness or the weight and credibility of his testimony until that witness has testified.

Appellant says he had a right to make an opening statement. Of course he had, so long and to the extent it remained within the bounds of propriety and good faith. We find neither in the conduct complained of here. It is urged that the opening statement should have been allowed to proceed and the evidence ruled on when offered. Not if improper. It must be kept within proper bounds, otherwise all manner of irrelevant and extraneous subjects could be stated to the jury and, in the absence of good faith, counsel could thus place before a jury much that he well knew could not later be introduced into evidence. If it be true, as appellant maintains, that the matters which he proposed to prove were entirely proper as a defense his remedy was on appeal, not to wilfully disregard the rulings of the Court. United States v. Bollenbach, 2 Cir., 1942, 125 F.2d 458. He would have, in subsequent offers, ample opportunity to protect his record. Appellant criticizes a statement of the trial court that an attack cannot be made on witnesses in advance as nonsense from the standpoint of reason and authority but it is not nonsense from the standpoint of reason and authority to say that in an opening statement you cannot resort to a blanket castigation and villification of witnesses; especially is this true where the villification and castigation is an expression of counsel's own opinion.

Appellant argues that the opening statement he was making could not have been curtailed without endangering the defense. We see no force to this argument. The ruling of the Court should have been complied with. The record was sufficiently definite to have permitted a review by an appellate court of the question of whether the opening statement had been unduly limited. Sunderland v. United States, 8 Cir., 1927, 19 F.2d 202, 208, 210-11.

We now consider the charge of contempt as it relates to the cross-examination of witness Garner. It is charged in the certificate that "Mr. Hallinan had launched into a dissertation upon the deportation proceedings." The trial court in making this statement apparently referred to a question put by appellant in the cross-examination of the witness Garner, who had identified himself as an attorney for the Bureau of Immigration and Naturalization. The question was: "Is it your custom as an attorney for the Government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?" In response to an objection made by the Government the Court stated that no issue with respect to the prior deportation proceedings against Bridges was before the court and that what the witness had done "with respect to matters of prior consequence" would not help determine any issue in the case before the court. It appears that almost immediately after this ruling was made appellant asked two other questions concerning the witness's acquaintance with the decisions in the prior deportation proceedings. There followed a prolonged argument by counsel on both sides, most of which was outside the presence of the jury. The certificate quotes the reiteration, during this argument, of the Court's ruling that "these matters of prior consequence [have] no legal bearing upon this matter." Appellant's response to this ruling was: "I will simply have to take the position, your Honor, that I consider very much in error your position, and I will have to continue to ask the questions and build a record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury."

implicit invitatio for an explicit ruling

The record discloses that the very first question asked the witness Garner by appellant after the jury was recalled was: "If you did not read all the decision of the Supreme Court, at least you read most of it, is that right?" Objection was made and sustained. The question immediately following was: "Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?" Objection was made and sustained.

Later came a question with respect to the witness's knowledge of wire-tapping prior and up to the time that Bridges was admitted to citizenship. Objection to this question was made and sustained. Another question concerned the witness's knowledge of wire-tapping at the time of the two previous deportation proceedings. Objection was made and sustained and the jury admonished to disregard any implications in the question. The witness was asked by appellant whether he had had any knowledge of wire-tapping before the deportation proceedings, whether he had protested against illegal wire-tapping, whether he had stated to any government official that he would not be a party to an illegal effort to injure Bridges. Objections to all these questions were sustained. The witness was then asked whether he had read in one of the prior deportation proceedings that 62 government witnesses had been rejected by the trier of fact as liars and perjurers. The objection to this question was also sustained. It was followed by an almost identical question with reference to a different prior deportation proceeding.

A later question was whether the witness had participated in the installation of a wire-tapping device in Bridges' room in a named hotel in Portland, Oregon prior to the 1939 deportation proceedings. The next question was whether the witness had participated in wire-tapping of Bridges in a New York City hotel in 1941. The next question was whether the witness has any contract with any government employees who were engaged in such wire-tapping. Objections to all the above questions were made and sustained.

Appellant extensively argues the general propriety of bringing in the defenses disclosed by the above related questioning. The vice found here is not in bringing in the defenses but the manner in which it was attempted to be accomplished. All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial Court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere. But, argues appellant, before the alleged error can be considered elsewhere, the record must be sufficiently ex-

plicit to enable a reviewing court to understand the nature and purpose of the excluded evidence. With this statement we are in entire agreement but are unable to find in the record before us justification for the conduct of appellant on that ground. We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made long before appellant desisted.

We have examined the cases cited by appellant in support of his argument that an attorney is not in contempt when he continues to ask questions regarding earlier proceedings after an initial reverse ruling.[1] We fail to find in the cited cases a comparable situation to the case at bar. The conduct of appellant in our opinion is inexcusable on any of the grounds urged. We realize the inadequacy of the cold record to fully present the situation as it existed in the court room during the turbulent times portrayed by this record. We do note an attitude of patience and forbearance on the part of the trial judge which continued until the authority of the Court was so flagrantly and openly defied that a contempt judgment was justified and merited if not openly invited.

It is said that the Court lost jurisdiction to proceed under Rule 42(a) by waiting from the adjournment of court on the evening of November 21, 1949, until 9:30 a.m. of November 22, 1949, before pronouncing the judgment of contempt. We do not agree. In re Maury, 9 Cir., 1913, 205 Fed. 626; United States v. Sacher, 2 Cir., 1950, ___ F.2d ___.

Criminal Rule 42(a) provides:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite facts and shall be signed by the judge and entered of

[1]Sprinkle v. Davis, 4 Cir., 1940, 111 F.2d 925, 930;
Caldwell v. United States, 9 Cir., 1928, 26 F.2d 694;
Fidelity & Deposit Co. v. Lindholm, 9 Cir., 1933, 66 F.2d 56;
Gianotos v. United States, 9 Cir., 1939, 104 F.2d 930.

record." We think the word "summarily" does not require hasty determination and that the night hours spent by the judge in preparing his summation for his contempt order, delivered on the following morning, are not an improper incident to summary action.

Complaint is made as to the severity of the sentence. It is severe. We are unable to say the Court abused its discretion in imposing it.[2] Gross misconduct merits commensurate punishment. We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice. An officer of a court has a higher duty to assist in maintaining the dignity and integrity of courts than does the ordinary citizen. True, every lawyer, if he is worthy of the name, must use every legitimate effort in support of his client and in so doing will be relieved from an improper contempt judgment. Caldwell v. United States, 9 Cir., 1928, 28 F.2d 684. No such condition exists here. The record reflects quite the contrary. From cases cited in the briefs we learn that appellant has on two occasions been held in contempt of a state court.[3]

Judgment affirmed.

(Endorsed:) Opinion. Filed May 23, 1950. Paul P. O'Brien, Clerk.

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[2]In re Maury, 9 Cir., 1913, 205 Fed. 626, 632;
Huffman v. United States, 10 Cir., 1945, 148 F.2d 943;
Compare sentence imposed in Fleming v. United States, 9 Cir., 1922, 279 Fed. 613.

[3]Hallinan v. Superior Court, 1925, 74 Cal.App. 427, 240 Pac. 799;
Ex parte Hallinan, 1932, 126 Cal. App. 121, 14 P.2d 797.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 300

VINCENT W. HALLINAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 304-315) is reported at 182 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1950 (R. 315) and a petition for rehearing was denied on July 13, 1950 (R. 316). On August 3, 1950, Mr. Chief Justice Vinson entered an order extending the time for filing a petition for a writ of certiorari to and including

September 11, 1950 (R. 316), and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of contempt of court.

2. Whether the district court acted within the powers granted by 18 U.S.C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure when it punished petitioner's contemptuous conduct summarily.

STATUTES AND RULE INVOLVED

Sections 401 and 402 of Title 18, United States Code, provide in pertinent part:

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 402. Criminal contempts

* * * * *

> This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

> Rule 42. Criminal Contempt.
>
> (a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On November 22, 1949, pursuant to 18 U.S.C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure, *supra,* petitioner Vincent W. Hallinan was summarily adjudged in contempt of court by District Judge Harris of the District Court for the Northern District of California, and was sentenced to six months' imprisonment (R. 283, 30). On appeal to the Court of Appeals for

the Ninth Circuit, the judgment of conviction was affirmed (R. 315). The circumstances attending the imposition of the contempt judgment may be briefly summarized as follows:

Petitioner was the trial attorney for Harry R. Bridges in a criminal prosecution for perjury and conspiracy brought against Bridges and two co-defendants.[1] The contempt judgment was based on petitioner's conduct and utterances during his opening statement to the jury and his cross-examination of the first government witness, one Garner (see R. 235-258). Petitioner's opening statement to the jury (R. 58-70, 91-114) was begun on Thursday afternoon, November 17, 1949 (R. 48), immediately following the Government's opening statement (R. 50-57), and was concluded on Friday morning, November 18th (R. 89, 91-114). His cross-examination of Garner occupied most of the afternoon of Monday, November 21st (R. 187, 189-218).[2] Just before adjournment on that day, Judge

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[1] The indictment (see R. 51-54) was in three counts. Count 1 charged Bridges and his codefendants, Schmidt and Robertson, with having conspired to defraud the United States in its naturalization functions by having Bridges fraudulently obtain naturalization by falsely swearing that he had never belonged to the Communist Party (R. 51-52). Count 2 charged Bridges with having perjured himself in the naturalization proceeding by falsely denying under oath that he had ever been a Communist (R. 52-53). Count 3 charged Schmidt and Robertson as aiders and abettors of Bridges (R. 53-54).

[2] Garner was the naturalization examiner who represented the United States in Bridges' naturalization proceeding. His direct examination (R. 115-131) and his cross-examination by Mr. MacInnis, counsel for Bridges' codefendants (R. 131-

Harris stated to petitioner, "Counsel, you have guided your own destiny pretty well with respect to what you have done thus far. * * * I have tried to make the ruling[s], but unfortunately you have seen fit to depart from them, consistently and persistently. I think we will meet at 9:30 [tomorrow morning] and discuss the matter" (R. 233).

At 9:30 a.m. on Tuesday, November 22d, Judge Harris and counsel convened in the absence of the jury (R. 233) and the following occurred (R. 234-235):

> The Court: * * * the Court has been concerned about the events of recent days, and in particular I refer to the course of conduct of Mr. Vincent Hallinan representing the defendant Mr. Harry Bridges. The record of the events which I am about to refer to presents a series of acts of misbehavior on the part of Vincent Hallinan which, if allowed to continue without comment on my part or official judicial action, might well disrupt the orderly processes of this trial. * * *
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> * * * In addition, Mr. Vincent Hallinan, by his studied, persistent and inflammatory course

186), consumed the balance of Friday, November 18th, and the morning of Monday, November 21st. Following petitioner's cross-examination of Garner, which consumed most of the afternoon of Monday, November 21st (R. 187, 189-218), Garner was briefly reexamined on direct (R. 219) and re-cross-examined by Mr. MacInnis (R. 220-221). Direct examination of the Government's second witness, one Schumacher, occupied the balance of that Monday afternoon (R. 224-231).

of conduct in flouting the authority and orders of the Court has attempted to impair the effectiveness of this Court as an instrument of the judicial process. That he was wilfully attempting to evade the rulings and orders of the Court is manifest from the record of the proceedings of the trial, all of which occurred in my presence.

Yesterday afternoon, Monday, November 21st, it became quite apparent to the Court that Vincent Hallinan would, unless prevented by prompt and firm judicial action, run unbridled and roughshod in the further progress of this trial. I was prompted then and there to make the order and findings which I am now about to make. However, to the end that I review coldly and dispassionately the transcript in the more pleasant environment of my chambers rather than attempt precipitous conduct, I read and reread and studied the transcript of the Court's proceedings from the very inception of the trial until the close of the proceedings, and I so read until the very early morning hours.

As I read and continued to read, coldly, dispassionately, my path became clearer and the course of my judicial conduct became manifest. The primary obligation imposed upon this Court or any Court worthy of the name is to maintain the orderly processes of the law and the due and proper administration of justice. * * *

* * * If I permitted this matter to go on unheeded, it would, in my opinion, represent a tragic commentary on our system, orderly as

> it is, in the administration of justice. My present task is not a pleasant one, and I approach it with a degree of care and a detached judicial aloofness.
>
> Accordingly, to the end that there shall be no mistake hereafter in the record concerning my views and the conclusions I reach, I shall review the record as the basis for an order and certificate of contempt required under * * * Title 18, Section 401, subsection 1 and Rule 42, of the Rules of Criminal Procedure.

Judge Harris then proceeded to review orally the record of petitioner's opening statement to the jury (R. 235-246) and his cross-examination of government witness Garner (R. 246-258), pointing out, by page-and-line references,[3] many instances in which petitioner had violated and evaded rulings of the court. It would be impractical, in a brief in opposition to certiorari, to attempt to summarize all such instances. Nor do we think it necessary to do so, especially in view of the fact that the opinion of the Court of Appeals (see R. 305-313) summarizes the instances at considerable length. We think it sufficient at this point to relate, in its context, one of the instances of studied and contemptuous violation by petitioner of court rulings. It occurs in the course of his cross-examina-

[3] The page-and-line references made by Judge Harris were, of course, to the original typewritten transcript of petitioner's opening statement and cross-examination of Garner. The page-references of the original transcript are preserved in the printed record before this Court through the bracketed folio-page numbers appearing throughout.

tion of the witness Garner. Judge Harris had earlier ruled that the prior deportation proceedings against Bridges (one before Honorable James M. Landis and the other before Honorable Charles B. Sears), the second of which culminated in this Court's decision in *Bridges* v. *Wixon,* 326 U.S. 135, were irrelevant to the instant perjury trial of Bridges, and therefore could not be gone into by counsel (R. 168; see also R. 205-208). Despite this ruling, the record of petitioner's cross-examination of Garner reveals the following (R. 208-213):

> Q. Now, Mr. Garner, I suppose it would be a fair conclusion that if you did not read all the decision of the Supreme Court, at least you read most of it, is that right?
>
> Mr. Donohue [government counsel]: I object, if Your Honor pleases. That question is——
>
> Mr. Hallinan: It is preliminary.
>
> Mr. Donohue: —not in conformity with the ruling which Your Honor made just a few minutes ago.
>
> The Court: The objection is sustained.
>
> Mr. Hallinan:
>
> Q. Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?
>
> Mr. Donohue: I object to the question, if Your Honor please.

Mr. Hallinan: This goes to his participation.

The Court: The objection is sustained that it is not in conformity with the ruling, Mr. Hallinan, and is an attempt to bring before the jury matters in obviation of my ruling. I admonish the jury to disregard any implications in the question.

Mr. Hallinan:

Q. Have you any independent knowledge —now, aside from any designation of any court—have you any independent knowledge of your own or information from any person in the government's employ that at any time during the course of this proceeding or of the previous—We will withdraw that—the course of this proceeding, any wire-tapping was done on Harry Bridges' telephone?

* * * * *

A. I have no knowledge of any wire-tapping in this case.

Q. This case. In other words, it is now your testimony that you have received no information at all from within the government, employees or agents, that is, as regards this case, that is, the case that we are now trying,—Harry Bridges' wires were tapped, is that right?

A. That's right. I have no such information or knowledge.

Q. Have you information that around the time that he was admitted to citizenship, that is, shortly prior to that time and up to the time

that he was admitted to citizenship his wires were so tapped?

Mr. Donohue: I object, if Your Honor please.

The Court: Sustained.

Mr. Hallinan:

Q. You have information, however, that in each of the two previous deportation matters—

Mr. Paisley [co-counsel for the Government]: Your Honor, that is obviously——

Mr. Hallinan: Pardon me; permit me to finish my question.

Mr. Paisley: I know what your question was.

Mr. Hallinan: Well, you haven't any right to anticipate that.

Q. Mr. Witness, would you answer this question:—

Mr. Hallinan: I think I am permitted to finish my question without interruption by counsel. Here counsel is saying that he can guess into my mind——

Mr. Paisley: No guesswork, Your Honor.

Mr. Hallinan: If he would, he would blush.

Q. Now, I want to ask this question: You do have information that the government indulged in illegal wire-tapping upon the two previous——

Mr. Paisley: Just a moment, counsel.

Q. (Continuing)—two previous deportation proceedings, have you not?

Mr. Paisley: If Your Honor please, if this is not contempt of court, I have never seen it in my career.

Mr. Hallinan: That is the first time I have ever heard counsel make a statement,—I ask the jury be admonished—

The Court: The objection is sustained, the jury is admonished to disregard any implications contained in the question. I have heretofore——

Mr. Hallinan: I have asked Your Honor to ask the jury to disregard the statement that counsel just made. It is a highly improper statement.

The Court: The statement made by counsel may well be within the realm of his province to make. I shall not instruct the jury to disregard his statement.

Mr. Hallinan: We enter an exception, if the Court please.

The Court: And I say to you, Mr. Hallinan, your persistent conduct along this line, studied as it appears to be, may well eventuate in the situation that counsel refers to.

Mr. Hallinan: We enter an exception to that statement of the Court and ask that the jury be instructed to ignore it.

The Court: The objection is overruled.

Mr. Hallinan: Very well.

Q. Now, did you yourself, in the period preceding, that is, looking toward, the deportation of Harry Bridges, and during that time—

not at the present—receive any information from any federal officer or agency that Harry Bridges' wires were being illegally tapped?

Mr. Donohue: I object to the question, if Your Honor please.

The Court: Sustained.

Mr. Hallinan:

Q. Have you at any time throughout the origin of the proceedings against Harry Bridges, that is, back in 1937 or '8 up to the present time, that is, up to today, made any protest of any kind to any agent of the government or any attorney of the government that there was or had been illegal wire-tapping of Harry Bridges?

Mr. Donohue: I object, if Your Honor pleases.

The Court: Sustained.

Mr. Hallinan:

Q. Did you at any time in the course of your connection with this case state to any official or agent of the government that you would not be a party to an illegal effort to injure this man?

Mr. Donohue: I object to the question, if Your Honor please, and I again ask Your Honor to admonish counsel to confine his cross examination to that well established rule of law to which Your Honor invited his attention just a few moments ago.

The Court: The objection is sustained.

Mr. Hallinan: Very well.

Q. In your study, whatever study you did make, of the Landis decision, you learned that 62 witnesses had been presented by the government against Harry Bridges and that Dean Landis had rejected all of them as liars and perjurers, didn't you find that out?

Mr. Donohue: I object to the question and again state to Your Honor that Mr. Hallinan's deliberate and repeated questions, which he knows as a lawyer are beyond the scope of that limitation defined by Your Honor, is highly contemptuous of the decision of this Court.

Mr. Hallinan: Your Honor, that is a highly improper statement for counsel to make, and that puts the defendant and his counsel in an invidious light with the jury. Now, we have the right to ask that question. I am entitled to inquire into this gentleman's mind and what his attitude is toward such findings and such statements as that.

The Court: The objection is sustained, Mr. Hallinan.

Mr. Hallinan: And I might ask you this, Your Honor——

The Court: It is an attempt to circumvent the ruling of this Court and place before this jury by indirection matters that have been ruled out, matters that are immaterial, that are irrelevant.

Mr. Hallinan: Your Honor, we have had no ruling upon any such question as that at all. There has been nothing said in that matter.

The Court: We spent, before the recess period, at least 45 minutes in discussion.

Mr. Hallinan: What it amounts to, Your Honor, is rendering it almost impossible to find out—This witness has now a shield of objections thrown around him that prevents the defense from finding out what his real interest in the case is.

The Court: That observation is uncalled for, unwarranted, purely gratuitous, and part of a studied plan.

Mr. Hallinan: Now I ask that Your Honor —Pardon me. I enter an objection to that statement and I ask that the jury be instructed to ignore it.

The Court: The objection is not well taken.

Mr. Hallinan: And I except to the Court's refusal to so instruct the jury.

Q. Now, getting away from these two proceedings that seem to involve me in so much criticism, you do know this, that 60 witnesses, different from those that testified before Landis, testified before Sears and that Sears rejected all but one of them as liars and perjurers; isn't that right, Mr. Witness?

Mr. Donohue: I again object—

Etc., etc.[4]

Following his oral review of petitioner's contemptuous conduct, Judge Harris adjudged petitioner in contempt and sentenced him to six

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[4] The incident, or series of incidents, contained in the quoted portions of the record was discussed by Judge Harris in his oral review of petitioner's conduct at R. 250-253, and by the Court of Appeals at R. 312.

months' imprisonment (R. 283, 30).[5] He subsequently filed a formal contempt certificate, pursuant to Rule 42(a), F. R. Crim. P. (*supra*, p. 3). This certificate reads (R. 30-31):

> In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for criminal contempt was committed in my presence and was seen and heard by me during sessions of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:
>
> Beginning on the 17th day of November, 1949, and continuing up to and including the 21st day of November, 1949, the events hereinafter recited, and annotated by me, took place in the courtroom.
>
> [This was followed by a *verbatim* repetition of that part of the *Bridges* record in which Judge Harris orally reviewed petitioner's contumacious conduct (see p. 7, *supra*), and which, consequently, is not reproduced in the printed record.]
>
> Certified this 22nd day of November, 1949 at San Francisco, California.
>
> (Signed) George B. Harris, United States District Judge.

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[5] Judge Harris also ordered that petitioner's name "be stricken from the roll of lawyers of this federal court" (R. 283), but subsequently, following an extended colloquy among counsel (R. 283-297), in staying the execution of the contempt sentence (R. 297), Judge Harris rescinded this order (*ibid.*) in order to permit petitioner to continue to act as Bridges' counsel at the perjury trial (R. 296-297), pursuant to Bridges' request (R. 288-289).

ARGUMENT

1. Petitioner contends that his conduct at the trial was not in fact contumacious (Pet. 7-31). He attempts to demonstrate, in a sentence-by-sentence analysis of that portion of the opinion of the Court of Appeals in which the court reviewed and summarized the instances of misconduct on petitioner's part as reflected by the record, that the most that the record shows is that he persistently made statements, asked questions, and adopted tactics, which the trial judge was of the *opinion* were improper, but that he never actually evaded or violated any *explicit ruling* of the judge. The contention is without merit.

It would be unprofitable to attempt to refute, incident by incident, petitioner's present contention. Judge Harris' certificate, which incorporates in its entirety his oral review of the instances of contumacious conduct (R. 235-258; see pp. 15, 7, *supra*), makes it clear that in instance after instance petitioner violated explicit rulings of the court. That this is true appears plainly from the excerpt from the transcript of the cross-examination of Garner which is quoted at length in the Statement, *supra,* at pp. 8-14. The cumulative effect of the incidents as a whole caused Judge Harris to find that (R. 234)—

> * * * Mr. Vincent Hallinan, by his studied, persistent and inflammatory course of conduct in *flouting the authority and orders of the Court* has attempted to impair the effective-

> ness of this Court as an instrument of the judicial process. That he was wilfully attempting to evade *the rulings and orders of the Court* is manifest from the record of the proceedings of the trial, all of which occurred in my presence. [Italics supplied.]

This finding by the judge who was on the scene and personally witnessed the "studied" (R. 236, 240, 247, 256), "persistent" (R. 240, 249, 256), and "unbridled" (R. 238, 239) course of conduct of petitioner—conduct wholly lacking in "good faith" (R. 247-248, 249, 253, 254), "not bordering on contempt, but contemptuous in every form and degree" (R. 256)—is of course entitled to great weight in appraising the adequacy of the evidence to support the contempt judgment.

The instant contention is simply an attack on the sufficiency of the evidence to sustain a criminal conviction for contempt. Two courts have reviewed the evidence and found it amply sufficient to sustain the conviction. Under these circumstances, there is no occasion, we submit, for this Court to reexamine that evidence. *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.[6]

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[6] Petitioner puts his evidentiary argument in several different forms. Thus, his argument that the contempt judgment violates the "right of counsel clause of the Sixth Amendment" (Pet. 31, 35-52) assumes that he kept within the lawful limits of advocacy in all that he did at the trial in representing his client. But the trial court found that he

2. There is no conflict, as petitioner claims (Pet. 32, 62-63), between the decision below and *Sprinkle* v. *Davis*, 111 F. 2d 925, 930 (C.A. 4). The *Sprinkle* case involved a civil suit for damages for injuries sustained in an automobile accident. The case was tried twice. At the second trial, the defendant's counsel offered in evidence a page of the record of the first trial for the purpose of showing that the plaintiff's counsel had on that occasion made a certain admission, relevant to the case, which was inconsistent with the plaintiff's testimony at the second trial. The trial judge excluded the evidence, remarking that he "had explained a half dozen times that the record of the previous trial could be referred to only to show that a witness had then given testimony different from that offered by him at the second trial." The judge "charged defendant's counsel with constant breaches of the rule, and declared that he would impose a fine upon them if the practice continued." On appeal by the defendant from an adverse judgment, the Court of Appeals said: "This statement [by the trial judge] was improper and highly prejudicial. Even if it be conceded that the

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went far beyond those lawful limits in persistently evading and violating court rulings. Similarly, the argument that the Court of Appeals accorded petitioner "a hearing in form only and not a hearing in substance" (Pet. 31, 53-57) is based on the assumption that the Court of Appeals "accept[ed] the accusations of the [trial judge's] certificate as true where the record conclusively shows that they are false" (Pet. 31, 53). But, as we have pointed out, the record shows nothing of the kind.

offered evidence was inadmissible, counsel were nevertheless entitled to offer it *in good faith*, free from threat of punishment by the court. Actions taken by counsel during the course of trial under a mistaken view of the law do not constitute contempt of court; *and a careful examination of the record convinces us that there was no such perseverance by defendant's counsel in a mistaken point of view contrary to the rulings of the court as to constitute improper conduct on their part*" [italics supplied]. It was this very "perseverance * * * in a mistaken point of view contrary to the rulings of the court," found lacking by the Court of Appeals in the *Sprinkle* case, which both courts below in the instant case found to have been present, and to have been so persistent and wilful as to constitute contempt.

3. Several of petitioner's contentions (Pet. 57-60, 60-62) are but different aspects of a single argument—that some of the trial court's rulings, for persistent violation of which petitioner was held in contempt, were incorrect as a matter of law. But, without conceding such to have been the case, the short answer to the argument is that made by the Court of Appeals (R. 313):

> Appellant extensively argues the general propriety of bringing in the defenses disclosed by the above related questioning. The vice

> found here is not in bringing in the defenses but the manner in which it was attempted to be accomplished. All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial Court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere. * * *

See also *Fisher* v. *Pace,* 336 U.S. 155, 162.

The Court of Appeals also adequately disposed of the related argument of petitioner—that, under previous Ninth Circuit decisions, "the cross-examiner had an insufficient record on appeal if he desisted after objection was sustained to his first question on a subject on cross-examination. He *should have asked further questions* and made an offer of proof" (Pet. 64-65; italics in the original). The Court of Appeals pointed out, immediately following the above-quoted language (R. 313):

> * * * But, argues appellant, before the alleged error can be considered elsewhere, the record must be sufficiently explicit to enable a reviewing court to understand the nature and purpose of the excluded evidence. With this statement we are in entire agreement but are unable to find in the record before us justification for the conduct of appellant on that ground. We think appellant went far beyond

> the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made long before appellant desisted.

The justice of this observation of the Court of Appeals is fully borne out, we submit, by the passage from the transcript of petitioner's cross-examination of Garner which we have quoted in the Statement, *supra,* at pp. 8-14.

4. Petitioner's contention that the trial court lost its power to punish him summarily for contempt by failing to impose sentence immediately upon the occurrence of the contemptuous conduct (Pet. 32-33, 67-70) is also without merit. The decided cases "are all to the general effect that the punishment should follow the acts of contempt with reasonable promptitude, but that the degree of promptitude depends upon the particular facts of each case, and that the punishment need not follow immediately if such an imposition would endanger the defense in a criminal case, or interfere with its conduct." *United States* v. *Sacher,* 182 F. 2d 416, 429 (C.A. 2, opinion of A. N. Hand, J.), petition for a writ of certiorari pending, No. 201; see also *O'Malley* v. *United States,* 128 F. 2d 676, 684 (C.A. 8), reversed on another ground *sub nom. Pendergast* v. *United States,* 317 U.S. 412; *In re Maury,* 205 Fed. 626, 631-632 (C.A. 9);

In re Grossman, 109 Cal. App. 625, 631-632; *Middlebrook* v. *State,* 43 Conn. 257, 268-269; *In re Cary,* 165 Minn. 203, 204-205; *In re Willis,* 94 Wash. 180, 184-185.

Even in *Ex parte Terry,* 128 U.S. 289, upon which Rule 42 (a), *supra,* p. 3, is based,[7] the obstruction to the court's business was terminated and the reading of the court's opinion was completed before steps were taken summarily to punish Terry for his contempt.[8] If petitioner's view were sound, this Court would have been required to grant the writ of habeas corpus to Terry on the ground that the lower court lacked power to punish him summarily for misconduct which was not a pending obstruction at the time the court acted. True, in the *Terry* case, the court acted on the same day on which the contemptuous conduct occurred, whereas here the trial judge sentenced petitioner on Tuesday morning for a contemptuous course of conduct which had extended over the preceding Thursday, Friday, and Monday. But, as Judge Frank observed in his concurring opinion the *Sacher* case, *supra,* 182 F. 2d at 457:

> * * * I fail to understand how the shortness, in Terry's case, of the interval between misconduct and punishment can support [Sacher's argument that the trial judge de-

[7] See Advisory Committee's note.

[8] See the detailed facts as set forth in the report of the case in the lower court, *In re Terry,* 36 Fed. 419, 420 (C.C. D. Cal.), and as reviewed in Circuit Judge Frank's concurring opinion in the *Sacher* case, *supra,* 182 F. 2d at 457.

> layed too long in imposing summary punishment by waiting till *the end of the trial;* contrast the instant case]. For that shortness cannot alter the basic fact that, in Terry's case, the summary punishment could not conceivably tend to prevent anyone from interfering with the orderly progress of the very case in which the improper interference took place. * * *[9]

Furthermore, petitioner's statement that *"Ex parte Terry,* 128 U.S. 289, 314, expressly left the question open whether summary proceedings could be used 'at a subsequent term or subsequent day of the same term' " (Pet. 68) is not an accurate statement of the question which that decision reserved. The question reserved was "Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order [Terry's] arrest and imprisonment for the contempt, *without first causing him to be brought into its presence, or without making reasonable efforts by rule or attach-*

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[9] Compare *In re Maury, supra,* 205 Fed. at 631-632: "We cannot agree with the contention of the plaintiff in error that the court below erred in waiting until the next day before proceeding to pass judgment upon him.

* * * * *

"We are of the opinion that the rule laid down in the case of Terry is entirely applicable to the case before this court. Obviously there can be no distinction between delaying until later in the same day, and delaying until the next day, before making an order adjudging an offender guilty of contempt of court; jurisdiction of the person of the offender having attached instantly upon the contempt being committed in the presence of the court."

ment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned" (128 U.S. at 314, italics supplied). Here, petitioner was present at the imposition of sentence, had every opportunity to be heard, and was in fact heard (see R. 258-262).

The essence of the power to punish summarily consists in the fact that the misbehavior has been committed in the very presence of the court. It is the personal witnessing by the court of the contemptuous conduct which gives rise to the summary jurisdiction. That jurisdiction attaches at the instant the contempt is committed, and reasonable delay in imposing punishment does not deprive the court of the power to proceed summarily. This Court made that point clear when it said, in the *Terry* case, *supra,* 128 U.S. at 311:

> * * * Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment. * * *

This being so, it matters not whether the court acts instantly upon the commission of the contempt or awaits a more propitious time at which to act. Here, Judge Harris, though "prompted then and there [i.e., on the preceding day, during petition-

er's cross-examination of Garner] to" hold petitioner in contempt, decided to "review coldly and dispassionately the transcript in the more pleasant environment of my chambers," rather than "attempt precipitous conduct" in the heat of the temper and impatience which petitioner's conduct had engendered (R. 234). It is difficult to see how petitioner could have been in anywise prejudiced by the restraint thus exercised by the judge. Rather, it was to his benefit, since action taken after calm reflection is notoriously more likely to be just than action taken in the heat of passion.

Significantly, Rule 42(a) imposes no requirement of instantaneous action as a condition of summary punishment. It simply provides that "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Both conditions were fulfilled here.

Equally without merit is petitioner's argument that there was no jurisdiction to proceed against him summarily because, he asserts, the trial judge "certified only that defendant's actions *'if allowed to continue without comment* on my part or official judicial action, *might well disrupt* the orderly processes of this trial'" (Pet. 67). In the first place, only a jaundiced eye could read the trial judge's certificate and his comments incorporated therein and yet conclude that there is no finding of

a present or imminent "disruption of orderly processes" which petitioner seems to deem essential (Pet. 67-70). The trial court found that by his "studied, persistent and inflammatory course of conduct in flouting the authority and orders of the Court [petitioner] has attempted to impair the effectiveness of this Court as an instrument of the judicial process." (R. 234). It can hardly be seriously suggested that a court's summary contempt powers are inadequate to deal with a course of conduct so motivated and that the "disruption" that must be worked must have been so complete as to make continuation of the trial impossible.

Moreover, 18 U.S.C. 401 grants to a "court of the United States * * * power to punish * * * such contempt of its authority * * * as— * * * (3) Disobedience or resistance to its lawful writ, process, *order, rule,* decree, or *command.*" [Italics supplied]. See *supra,* p. 2. There can be no question that the trial court found "disobedience or resistance" to its orders and that finding, without more, is sufficient basis for its summary judgment of contempt. If present or imminent disruption is a condition on the exercise of the court's summary contempt power, Congress can be taken to have decided the obvious proposition, in 18 U.S.C. 401 (3) itself, that disobedience or resistance to a court order is, *per se,* disruption or obstruction of the judicial process.[10]

[10] The remaining contentions of petitioner do not, in our view, require extended discussion. Conceding, *arguendo,* that

CONCLUSION

The judgment below is correct and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1950.

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the Court of Appeals had the power to reduce the sentence (see Pet. 70-71), it certainly was not required to do so, and there is no showing that the trial judge abused his discretion in imposing a six-month sentence, particularly in view of the flagrancy of petitioner's contemptuous conduct. That the Court of Appeals referred in its opinion to the fact that petitioner had twice previously been convicted of contempt in California state courts (see Pet. 71; R. 315) obviously does not impinge upon the rule that evidence of prior offenses is, with certain well-recognized exceptions, inadmissible at a jury trial of charges arising out of a different, unconnected offense. Finally, there is no need to consider the contention that a court may not, as an incident of a summary contempt judgment, summarily order the name of an attorney to be stricken from the roll of attorneys entitled to practice before it (see Pet. 71), since, as we have pointed out (*supra*, p. 15, note 5), and as petitioner acknowledges, this aspect of the court's order was rescinded, and was not included in the judgment appealed from.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 300

VINCENT HALLINAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR A REHEARING AND SECOND PETITION FOR A REHEARING.

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PETITION FOR LEAVE TO FILE SECOND PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Vincent Hallinan respectfully asks leave to file a second petition for rehearing after denial of his petition for certiorari in the above entitled case. The Court of Appeals, deciding petitioner's case at 182 F. (2d) 880, based one point upon the Second Circuit decision in *Sacher v. U. S.*, 182 F. (2d) 416 (182 F. (2d) 882, 887). Subsequent to petitioner's petition for rehearing this Court granted a rehearing and a writ of certiorari in *Sacher v. U. S.*, 20 U.S.L.W. 4180. On March 10, 1952, it decided that case on the merits (20 U.S.L.W.

4180) and on the same day denied the petition for rehearing in petitioner Hallinan's case. The decision in petitioner's case was evidently treated as dependent on the decision in *Sacher v. U. S.* (the original petitions for certiorari in both cases had likewise been denied on the same day—June 4, 1951). Both counsel for petitioner Hallinan and counsel for the petitioners in *Sacher v. U. S.* believe that the opinion in *Sacher v. U. S.*, 20 L.W. 4180 contains statements which can and should be made the subject of a petition for rehearing. (The petitioners in *Sacher v. U. S.* may petition for rehearing as a matter of right.) *Sacher v. U. S.* by its own language is a decision of first impression; it construes for the first time the respective limits of Rules of Criminal Procedure 42(a) and 42(b). The language of the opinion also leads to the inference that the Court decided this question squarely contrary to all available historical evidence as to the intended effect of the sections. For those reasons, the present holding should be reviewed; petitioner's case being directly affected by the new *Sacher* holding, he should be permitted to present his arguments on the subject.

Petitioner accordingly asks leave of this Honorable Court to file the attached second petition for rehearing and to have the same considered on its merits.

Dated, San Francisco, California,
March 19, 1952.

GEORGE OLSHAUSEN,
Attorney for Petitioner,
Vincent Hallinan.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 300

VINCENT HALLINAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

SECOND PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I. FACTS.

Before discussing legal issues we wish to correct an apparent misapprehension of fact regarding petitioner Hallinan's case.

Justice Frankfurter, dissenting in *Sacher v. U. S.* has the following to say about *Hallinan v. U. S.* (20 L. W. 4180, 4191):

"The complained of conduct did not at all bring the judge personally into the controversy."

It may reasonably be inferred that other members of the Court share this impression.

On the contrary, the following excerpts from the record show that the trial judge felt himself to be personally in a conflict with defendant Hallinan. (Hallinan had filed an affidavit of disqualification on basis of litigation in which he and the judge had been involved before the judge was on the bench. R. 34-7.)

(Emphasis added throughout.)

(R. 234):

"The Court. * * * In addition, Mr. Vincent Hallinan, by his studied, persistent and inflammatory course of conduct in flouting the authority and orders of the Court *has attempted to impair the effectiveness* of this court as an *instrument of the judicial process.* * * *"

(R. 235):

"However there is an anomaly apparent throughout the country today and exemplified perhaps in some of our more recent trials, in that *those who cry so earnestly for protection under the mantle and cloak of our Constitution of the United States would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system.* * * *"

(*Note.* This is said respecting *an attorney before the court!* The judge virtually accuses Hallinan of trying to overthrow the Government in the Courtroom.)

(R. 250):

"The Court. * * * Mr. Paisley [one of the prosecutors]—mildly, Southern drawl, temperate * * *"

(R. 253):

"The Court [referring to Hallinan's complaint that his cross-examination was being unduly restricted]. That observation is uncalled for, unwarranted, purely gratuitous and a *part of a studied plan.*

* * * * * * *"

(R. 254):

"At page 748, again in my quest for good faith, *again naively,* I thought I might find it some place."

(R. 256):

"And page 754 *Mr. Hallinan, dissembling with the court, seeking to justify a non-existent reason for his course of studied conduct,* seeking to jettison the witness."

(R. 257):

"The Court. * * * After *Mr. Hallinan's wheedling and somewhat dissembling,* said he wanted a ruling from me. He now wanted a ruling. We have now reached page 755 and he was asking me to rule. * * *"

(R. 257):

"* * * Page 755, line 19, Mr. Paisley again, I suppose somewhat amazed with reference to our western type of practice."

(R. 259):

"Mr. Hallinan. Very well, then your Honor. I want to make this motion and objection on it, and this is the proper time to do it. I want to ask the Court first to disqualify himself from proceeding further upon this matter.

Now, your Honor will understand that we have two elements involved in a matter of this kind. One is the defendants whom we represent in the matter, and the other is my personal self. And of course, this motion now applies to the matter relating to my personal self. And under the circumstances, of course, your Honor should not make a finding upon the matter and should not make any certificate of any judgment. But your Honor should take the matters that you have read off, and which I assure you do not constitute contempt in any part, and transfer it to another judge, for the reason,—and if your Honor will not concede this and stipulate it, then I will ask to be sworn and make a formal motion of the matter —that within the last three years your Honor appeared as a witness in a case in which I was sued by your close and intimate friend, Eugene Aureguy, in which he sued me for the sum of $10,000. And your Honor will remember you appeared in the Superior Court as a witness and testified in his behalf. And your Honor will also remember that prior to that time you endeavored privately in your chambers, as a justice in the city courts, to persuade me to deliver Mr. Aureguy $10,000 which he claimed.

The Court. *That is false and untrue.*"

(R. 281):

"The Court. * * * And I say to you, Vincent Hallinan, you, your colleague, Mr. MacInnis—an able young fellow, a man of ability—that you would have had no trouble in this case, but you saw fit to take the reins, ride rough-shod over my orders, impugn the integrity of the Court. I say no more. I think you know in your own heart, your own conscience, as you stand there, that everything you have said this morning is false, untrue, unfair, and scurrilous. Man to man, in an alley or in a courtroom, you couldn't look me in the eye and say that.

Mr. Hallinan. Let me put it—Let me file an affidavit making the charge, and charge me with perjury, sir.

The Court. You will not file the affidavit.

Mr. Hallinan. Then we will try it out.

The Court. You will not file any affidavit before me, Mr. Vincent Hallinan.

(R. 287):

"The Court. Mr. Paisley, may I address myself to you? You have participated in some rather outstanding trials, including the United States v. May; the Congressman, the Garsson trial; I do not know whether you had any participation in the more recent trial in New York before Judge Medina, but I feel that you are a pretty temperate fellow. I have seen you in court here. We are dealing with a brother lawyer. In effect, we are all lawyers. How do you feel toward the situation?

Mr. Paisley. Your Honor, I have never seen any such performance as this in my life. Your

> Honor has indicated that you have never seen any such contemptuous conduct in a courtroom. I daresay no appellate court will ever receive such a record as this. ***Mr. Hallinan—I will not refer to him as counsel—I will not prostitute the word by using it in relation to this matter.*** He has desecrated this temple of justice.
>
> * * * * * * *
>
> The Court. * * * Mr. Paisley, ***thank you very much.***"

The foregoing passages from the record show distinctly that "the complained of conduct *did* * * * bring the judge personally into controversy". The case presents the same problem as *Sacher v. U. S.*

II. SACHER v. U.S. INTERPRETS RULES OF CRIMINAL PROCEDURE 42(a) AND 42(b) FOR THE FIRST TIME AND CONTRARY TO THE PROBABLE INTENT OF THE FRAMERS.

A. Preliminary statement.

In *Sacher v. U. S.* the grant of certiorari was limited to the question:

> "Was the charge of contempt, as and when certified, one which the accusing judge was authorized under Rule 42(a) to determine or punish himself; or was it one to be adjudged and punished under Rule 42(b) only by a judge other than the accusing one, and after notice, hearing, and opportunity to defend."

The question whether the *Sacher* petitioners were guilty of contempt was excluded from review. It is

therefore beside the point and illogical for the Court to quote the Court of Appeals' opinions as to how heinous the *Sacher* petitioners' contempt supposedly was. (20 L.W. 4180 at 4180.)

B. The opinion interprets Rule 42(a) as enlarging previous power to punish for summary contempt.

1. The Rules of Criminal Procedure went into effect March 21, 1946. (See Rules of Criminal Procedure, Fed. Code Ann. p. 3.) At that time the language of this Court was to the effect that the power to punish summarily for contempt should be confined to the narrowest limits of necessity. (*Anderson Dunn* (1821) 19 U.S. (6 Wheat.) 204, 230-31. *Cooke v. U. S.* (1925), 267 U.S. 517, 536; *In re Michael* (1945), 326 U.S. 224; also *Nye v. U. S.* (1941), 313 U.S. 33, 52, overruling *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402; *In re Oliver* (1948), 333 U.S. 257, 274 follows *Cooke v. U. S.*, supra.)

2. (a) This Court in *Sacher v. U. S.* says that it is concerned with Rule 42(a), not with any decisions preceding it. The opinion further says that Rule 42(a) has virtually no legislative history:

(20 L. W. 4180, 4180-91):

> "Rule 42 obviously was intended to make more explicit: 'the prevailing usages at law' by which the statute has authorized punishment of contempts. * * * No legislative history sheds light on this issue. * * * Cases prior to it (Rule 42) grew out of facts so distinguishing that their decisions are of little value as precedents."

(b) *Sacher v. U. S.* also says (20 L. W. 4180, 4181):

> "But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. * * *"

(20 L. W. 4182):

> "* * * The purpose of that [adversary] procedure is to inform the court the course of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence."

To say that the *knowledge* of the trial judge is the distinguishing feature between summary (42(a)) and adversary (42(b)) proceedings goes directly contrary to the language of *Cooke v. U. S.*, 267 U.S. 517, 536:

> "We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice', as Blackstone has it, is not *instantly suppressed and punished,* demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment constituting the due process that the assumption that the court saw everything that went on in open court was required to justify the ex-

ception; but the need for the immediate penal vindication of the dignity of the court created it."

Since this is a formulation of underlying theory before application to specific instances, the fact that "it grew out of facts so distinguishing" (20 L. W. 4180, 4181) is of minimum importance.

The statement of underlying theory in the present case is almost diametrically contrary to the statement of underlying theory in the *Cooke* case. So far as *Sacher v. U. S.* rejects the limitations of *Cooke,* it gives Rule 42(a) a broader scope than that of summary procedure as understood before the rule was enacted.

(c) As indicated, *Sacher v. U. S.* says rule 42(a) has virtually no legislative history (20 L.W. 4180, 4181):

"No legislative history sheds light on this issue."

Such dearth gives all the more point to what little legislative history as may be found. The only historical data seem to be the code Advisory Committee's Notes (8A F.C.A. p. 30):

"*Note to subdivision* (a) This rule is substantially a restatement of existing law.

Ex parte Terry, 128 U.S. 289; *Cooke v. U.S.,* 267 U.S. 517, 534."

"Note to Subdivision (b).

* * * * * * *

"The provision in the sixth sentence disqualifying the judge affected by the contempt if the

charge involves disrespect to or criticism of him is based in part on 29 USC 112 (contempts, demand for retirement of judge sitting in proceeding) and the observations of Chief Justice Taft in Cooke v. US, 267 US 517, 539."

While these notes refer to pages 534 and 539 of the *Cooke* opinion rather than to page 536, they clearly show that the advisory committee had *Cooke v. U. S.*, 267 U.S. 517 in mind when it drafted the rules. It certainly must have accepted Chief Justice Taft's formulation of underlying theory.

The present opinion does not accept Chief Justice Taft's formulation of the limits of summary contempt. In short, it not only enlarges those limits as previously understood, but it does so in the face of the only historical evidence which seems to be available—the advisory committee's notes. A construction of a rule which is on its face without historical support and goes against the only historical evidence available should be reconsidered before being made a precedent.

III. "NECESSITY" PRINCIPLE PLACES HALLINAN CASE WITHIN RULE 42(b).

If the test of "necessity" is accepted as fixing the limits of summary contempt, *Hallinan v. U. S.* was properly a matter to be prosecuted with notice and hearing under Rule 42(b).

How limited is the "necessity" for summary contempt proceedings may be seen from the practice of

the federal commissions. They do not exercise the power to punish directly at all. Compare *Interstate Commerce Comm. v. Brimson* (1894), 154 U.S. 447. We have found no record of any exercise of power to punish directly by any federal commission. While the substance of their decisions may be legislative (*Prentiss v. Atlantic Coastline R. R.*, 211 U.S. 210) their procedure is judicial. Yet they have managed to function for the last sixty years without exercising any power of summary contempt.

Conceding that such necessity may at times exist, its narrow scope is defined by the Court's own analysis. It is said (20 L.W. 4181-2):

> "The rule in question contemplates that occasions may arise where the trial judge must immediately arrest any conduct of such nature that *its continuance would break up a trial*, so it gives him power to do so summarily.
>
> * * * * * * *
>
> The procedure on which petitioners now insist is just the procedure most likely to achieve the only discernible purpose of the court conduct. Had the trial judge pursued that course, they could have made a formidable assertion that it was unfair to them or to their clients and that a new trial was required on account of it."

Yet if the rule is intended to *operate immediately*, on conduct which would otherwise *"break up the trial"* it certainly contemplates that *punishment* should be imposed immediately. (Cf. *Cooke v. U.S.*, 267 U.S. 517, 536, quoted supra.) An assignment of misconduct would be good only if the contempt holding were un-

justified. To allow punishment to be postponed reduces the immediate effect of the sentence to that of a mere admonition. Certainly the filing of a criminal complaint against the lawyer (to be tried before another judge) has the effect of an admonition. It was Samuel Johnson who said:

> "Yes, sir, but it is painful to be forced to defend it. Consider, Sir, how should you like, though conscious of your innocence, to be tried before a jury for a capital crime, once a week."
>
> *Boswell's Johnson* (Glover ed. 1901), Vol. 2, pp. 230-31.

The difference between the admonition of a complaint under 42(b) and the admonition of postponed punishment under 42(a) is that in the former case the defendant gets a fair trial and in the latter he gets no trial. If he is guilty (but his conduct does not threaten to "break up the trial") he will presumably be found guilty under 42(b). If he is not guilty, a summary finding of guilt under 42(a) with punishment postponed can serve nothing but to create gratuitous hostility between Court and counsel. It is not the admonition of postponed punishment but actual punishment on the spot which characterizes a 42(a) proceeding. Perhaps *Ex Parte Terry,* 128 U.S. 289—drawing a knife on the marshal in the courtroom—is the best example of an incident which calls for the exercise of such power. But where immediate punishment is not required, there is no occasion or necessity for immediately pronouncing sentence without a hearing. If, as *Cooke v. U. S.,* 267 U.S. 517, indicates,

necessity alone authorizes summary contempt procedure, then, where immediate punishment is not required, condemnation without a hearing is not permitted.

In *Hallinan v. U. S.,* the pronouncement of sentence was delayed until a later day. The infliction of punishment was delayed until the end of the trial. Pending trial the summary finding of guilt was an admonition and nothing more, but it was an admonition in the form of a judgment without notice or hearing. We submit sacrificing so much (i.e. notice and hearing) for so little (an admonition) was not the purpose of Rule 42(a). The Court should review its holding that the rule extends beyond cases which require immediate forceful intervention. It should accordingly grant rehearings in this case and in the *Sacher* case.

Dated, San Francisco, California,
March 19, 1952.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Petitioner,
Vincent Hallinan.

CERTIFICATE OF COUNSEL.

I certify that I consider the foregoing petition for a rehearing well taken in law; that the same is not filed for delay, and that it is confined to matters authorized by Rule 33(2) of this Court.

Dated, San Francisco, California,
March 19, 1952.

GEORGE OLSHAUSEN,
Attorney for Petitioner,
Vincent Hallinan.